IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 19, 2006 Session

JAMES A. DELLINGER v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Blount County
No. C-14432 D. Kelly Thomas, Jr., Judge

No. E2005-01485-CCA-R3-PD - Filed August 28, 2007

The petitioner, James A. Dellinger, appeals as of right from the order of the Blount County Circuit Court denying his petition for post-conviction relief from his 1992 conviction for first degree murder and resulting death sentence. The petitioner claims that (1) this court should review the trial court's opinion in its entirety under a purely de novo standard of review; (2) an incorrect and unconstitutional burden of proof has been applied to the petitioner's claims of ineffective assistance of counsel; (3) his conviction and death sentence violate his rights to due process because he is actually innocent of the conviction offense; (4) the state withheld exculpatory information at the trial; (5) counsel provided ineffective assistance to him at trial and on appeal;(6) the petitioner was not afforded a full and fair hearing of his post-conviction petition in violation of his due process rights; (7) the death sentence is unconstitutional because it infringes upon the petitioner's fundamental right to life; (8) the aggravating factor used in support of the death sentence was not included in the indictment and returned by the grand jury; (9) Tennessee's death sentence is unconstitutional because prosecutors are given absolute discretion to pursue or to forego the pursuit of the death sentence in each case; (10) execution by lethal injection violates the principles against cruel and unusual punishment; (11) the petitioner's conviction and death sentence are in violation of international law; and (12) Tennessee's death penalty scheme is unconstitutional. We conclude that no error exists, and we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Donald E. Dawson and Catherine Y. Brockenborough, Nashville, Tennessee, for the appellant, James A. Dellinger.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Mark E. Davidson, Assistant Attorney General; Michael L. Flynn, District Attorney General; Rocky H. Young, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In April 1982, the petitioner was convicted of the premeditated first degree murder of Tommy Griffin. The state filed notice of intent to seek the death penalty based on the single aggravating circumstance that the defendant was previously convicted of a felony involving violence. See T.C.A. § 39-13-204(i)(2). At the sentencing phase, the jury found that the prior violent felony aggravating circumstance was established and outweighed any mitigating circumstances beyond a reasonable doubt. The jury sentenced the petitioner to death. The petitioner's nephew and co-defendant, Gary Wayne Sutton, was also convicted and sentenced to death. On appeal, the Tennessee Supreme Court affirmed the judgment. See State v. Dellinger, 79 S.W.3d 458 (Tenn. 2002), cert. denied sub nom Dellinger v. Tennessee, 537 U.S.1090, 123 S. Ct. 695 (2002).

As set forth in our supreme court's opinion on direct appeal, the proof at the petitioner's trial established the following facts surrounding the murder of Tommy Griffin:

> On the afternoon of February 21, 1992, Dellinger, Sutton, and Griffin spent several hours at Howie's Hideaway Lounge (Howie's) on Highway 321 in Maryville, Tennessee. The three men drank beer and played pool until approximately 7:00 p.m., when they left the bar in a dark-blue Camaro. Witnesses testified that there was no evidence of hostility among the men while they were in the bar.
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> Around 7:00 p.m. Cynthia and Kenneth Walker were traveling north on Alcoa Highway near the Hunt Road exit. They observed three men who appeared to be fighting in a dark-colored Camaro on the side of the road. Two of the men were standing outside of the car attempting to forcibly remove the third man from the back seat. Kenneth Walker used his portable radio to report the incident to the dispatcher for Rural Metro Blount County Ambulance.
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> Sharon Davis, who was also driving north on Alcoa Highway around the same time, observed a shirtless and shoeless man stumbling down the side of the road near the Hunt Road exit. When Davis passed the same area about thirty or forty minutes later, she saw two men standing outside of a dark-colored Camaro on the side of the road. They appeared to be looking for something.
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> At 7:11 p.m. Sandra Hicks, a dispatcher for Blount County 911, received a complaint about an altercation involving three men in a dark Camaro at the intersection of Alcoa Highway and Hunt Road. Officer Steve Brooks with the Alcoa Police Department was

dispatched to the scene. While making an unrelated traffic stop, Officer Brooks noticed a vehicle with flashing headlights parked on the side of Hunt Road. The officer sent his backup, Officer Drew Roberts, to investigate. Officer Roberts found two men, not Dellinger and Sutton, standing next to a pickup truck. A shirtless man sitting on the bed of the truck identified himself as Griffin. Griffin told the officer that his friends had put him out of a car. Griffin would not identify his friends or tell the officer what had happened. Officer Roberts arrested Griffin for public intoxication. Griffin was booked at the Blount County jail at 7:40 p.m. Dellinger arrived about forty-five minutes to an hour later to ask about Griffin's release. Sergeant Ray Herron explained to Dellinger that department policy required a minimum four-hour detention for public intoxication and advised him to come back at 10:30 or 11:00 p.m.

Alvin Henry was a resident of Bluff Heights Road, where Dellinger and Griffin both lived. At approximately 9:00 p.m., Henry looked out of his trailer window and saw Dellinger's white Dodge pickup truck. Henry saw someone enter the passenger side of the truck. The truck drove up the road and pulled into Dellinger's driveway. Henry then noticed fire shooting from Griffin's trailer down the road. Henry's wife reported the fire to the 911 operator at 9:02 p.m. Arson investigator Gary Clabo concluded that the fire was set intentionally with the use of a liquid-type accelerant and an open flame such as a match, candle, or cigarette lighter.

Jennifer Branam, Griffin's niece, ran to Dellinger's trailer when she learned that Griffin's trailer was on fire. Just as Dellinger's wife was telling Jennifer that Dellinger was not home, Dellinger and Sutton walked down the hall from the living room. The two men were still wearing their jackets, and their pants were wet up to the knees. Jennifer asked them if Griffin was in his burning trailer, and Sutton told her that Griffin was in Blount County with a girl. When Jennifer asked the men to accompany her to the trailer, Dellinger responded that they were already in enough trouble.

After returning home, Jennifer looked out the window and saw Dellinger remove an object wrapped in a sheet from his truck and place it into the back of his wife's Oldsmobile. Jennifer testified that the object resembled a shotgun. Herman Lewis, a relative of Jennifer, also observed Dellinger moving an object from his truck to his wife's car shortly after 10:00 p.m. Dellinger and Sutton then left in the Oldsmobile.

At around 11:25 p.m. Dellinger and Sutton returned to the Blount County jail. Dellinger paid a cash bond for Griffin. Officers in the jail lobby overheard one of the defendants tell Griffin that they needed to get him back to Sevier County. At 11:55 p.m. Jason McDonald and his mother, Brenda McKeehan, heard two gunshots fired from an area on the Little River in Blount County called the Blue Hole. The Blue Hole is approximately five hundred yards down the hill from McDonald's residence.

The next morning, February 22, Jennifer Branam saw Dellinger leave his trailer, remove the object he had placed in his wife's car the night before, and place the object under his trailer.

Around noon on February 22, Connie Branam, Jennifer's mother and Griffin's sister, informed her daughter Sandy of her intent to go to Blount County to look for Griffin. At about 2:00 p.m., Connie Branam went to Jerry Sullivan's grocery store in Townsend asking if anyone had seen her brother. Sullivan then saw Branam speaking with two men in a white Dodge pickup truck in the grocery store parking lot.

Later that afternoon, Connie Branam accompanied Dellinger and Sutton to Howie's. Branam told Jamie Carr, who worked as the afternoon bartender at Howie's, that she was looking for her brother. Responding to Dellinger's questioning, Carr repeatedly told them that she remembered Dellinger, Sutton, and Griffin from the night before. When Dellinger asked if Carr remembered with whom Griffin left, she responded that they were still at the bar when her shift ended. Dellinger told Carr that they last saw Griffin with a short, dark-haired, ugly woman. When Carr's shift ended at 5:00 p.m. on February 22, Branam, Dellinger, and Sutton were still drinking beer in the bar.

Terry Lilly Newman worked the shift following Carr's at Howie's. When she approached Branam, Dellinger, and Sutton to ask if they needed anything, Dellinger asked Newman if she remembered them from the night before. Newman responded that she recalled seeing Dellinger and Sutton with another man drinking beer and playing pool. Branam explained that she was looking for her brother and asked with whom he had left the bar. Newman became confused because she knew that Griffin had left with Dellinger and Sutton. Dellinger asked Newman if she remembered them returning to Howie's after they bailed Griffin out of jail, but Newman knew that the three had not returned to Howie's because she had worked until

closing. After unsuccessfully attempting to convince Newman to join them in their search for Griffin, Sutton asked Newman if she was married. When Newman responded that she was married, Sutton stated, "Well, your husband is going to be surprised whenever you're missing one morning, when he wakes up and you're missing." Dellinger, Sutton, and Branam left Howie's around 6:30 p.m.

About 8:00 p.m. that night, James and Barbara Gordon observed a fire in the woods near the Clear Fork area of Sevier County. The following morning, Barbara Gordon watched a white truck occupied by two men leave the woods and head toward the main road. She testified that the truck was traveling rapidly and that it came from the general area where they had observed the fire the night before.

On Monday, February 24, around 3:30 p.m. Griffin's body was discovered lying face-down on a bank at the Blue Hole. He had been shot in the back of the neck at the base of the skull with a shotgun. Two 12-gauge shotgun shell casings and beer cans were found near the body. The shotgun shells were fired from the same gun that fired shells later found in Dellinger's yard. Forensic pathologist Dr. Charles Harlan opined that Griffin had died between 6:00 p.m. on February 21 and 8:00 a.m. on February 22. Dr. Eric Ellington with the Blount County Medical Examiner's Office conducted the autopsy on Griffin's body. He concluded that the cause of death was the destruction of the brain stem from the shotgun wound. Ellington retrieved two metal pellets and two pieces of shotgun wadding from Griffin's brain. The pellets were consistent with pellets loaded in the 12-gauge "00" buckshot casings found near Griffin's body.

On Friday, February 28, Connie Branam's body was discovered in her burned vehicle in the wooded area where the Gordons had observed the fire on February 22. Arson investigator Gary Clabo determined that the fire had been set by human hands, started by an outside ignition source with the use of an accelerant. Branam's body was so badly burned that forensic anthropologist Dr. William Bass was unable to determine the cause or time of death. Dental records were necessary to identify the body. Investigators discovered a rifle shell in the burned vehicle that had been fired from the .303 rifle later found in Dellinger's trailer.

Based upon the above evidence, the jury convicted Dellinger and Sutton of the first degree premeditated murder of Griffin.

State v. Dellinger, 79 S.W.3d at 462-465.

Post-Conviction Proceedings

On March 3, 2003, the petitioner filed a petition for post-conviction relief in which he claimed that he received the ineffective assistance of counsel at the trial. Counsel were appointed and filed an amended petition in August 2003, followed by several amendments. In his amended petition, the petitioner claimed that counsel were ineffective in the trial and on appeal; that the prosecution engaged in misconduct; that the state improperly handled evidence; that the evidence was insufficient to support his conviction; that the trial court failed to sequester prospective jurors; that the death penalty scheme in Tennessee is unconstitutional; that his conviction and sentence violate international law; that the indictment failed to include the statutory aggravating factors under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000) and its progeny; that his execution would be unconstitutional because he is mentally retarded; and that other constitutional defects exist in Tennessee's death penalty scheme, including assertions that Tennessee fails to conduct actual proportionality review and that death by lethal objection is unconstitutional.

Post-Conviction Hearing
Petitioner's Proof

Sherman Tullock testified that he worked with the petitioner building log homes during the early 1990s. He said that he also socialized with the petitioner and rented a house from him. Tullock said that the petitioner repaired old cars for resale and that his son had purchased a few cars from the petitioner. Tullock said that the petitioner would "help anybody," including by repairing things or lending people money. He said that he and the petitioner drank "quite a bit of beer" together and that he had not observed much change in the petitioner when the petitioner drank. Tullock said he was present when the victim and the victim's sister were socializing with the petitioner and had seen the victim and the petitioner drink beer together. Tullock said he had never known the petitioner to carry a grudge against anyone. On cross-examination, Tullock testified that he was not aware whether the petitioner had suffered an on-the-job injury that caused him to seek worker's compensation benefits. Tullock said that he had never seen the petitioner become angry and had never discussed the murders of the victim and Branam with him. Tullock said that when he and the petitioner went out together, they would drink and "stay around and play pool half the night" but that he had never seen the petitioner drunk.

Edward Miller, Public Defender for the Fourth Judicial District, testified that he had held this position since 1989 and was appointed as the petitioner's counsel in his Sevier County trial. Mr. Miller testified that during the case, he filed motions for discovery and did not receive any information from the state in response.

Janice Viola Reed testified that she lived near Branam for ten years before her murder. Reed said that on February 22, 1992, the day that Branam disappeared, Branam called her three times. Reed said that Branam told her that she was looking for the victim and asked Reed to accompany

her to a club called the Mouse's Ear. Reed said that the last time Branam called, she told Reed that she was not able to reach her mother and asked Reed to "run down and tell my mom they're following me out of the holler." Reed said that she did not know to whom Branam was referring but related the message as requested. Reed said that it was getting dark at the time and estimated Branam last called her after 3:00 p.m.

Danny Sutton testified that he knew a person named Bill Cogdill whose trailer burned. Sutton acknowledged that in a statement he provided to authorities on March 2, 1992, he said he went to Cogdill's home looking for him one night in March. He said that Cogdill was not there and that he continued to the home of other friends where Cogdill later joined them. Sutton said he followed Cogdill home where Cogdill parked his truck and rode back with Sutton to their friends' home. Sutton said that later that night, when he drove Cogdill home again, they arrived to find Cogdill's trailer burning and a fire truck at the scene. Sutton recalled that sometime after Cogdill's trailer burned, Cogdill offered him two hundred dollars to go with him to Happy Hollow in Wears Valley in order that Cogdill could burn Cogdill's truck. Sutton acknowledged telling investigators that Cogdill told him he needed to burn the truck because there were fingerprints on it, but Sutton said he did not take Cogdill seriously. Sutton said the petitioner was arrested for the victims' murders at about the same time that Cogdill's trailer burned. On cross-examination, Sutton agreed that he gave his statement on March 2, 1992, the day after Cogdill's trailer burned.

Charles Deas testified that he and co-counsel Gene Dixon were appointed to represent the petitioner at his Blount County trial. Deas said that he had practiced law for thirty-two years and that the petitioner's case was the first capital murder case that he tried. Deas said he and Dixon worked closely throughout the case with counsel for co-defendant Sutton although there was no formal joint defense agreement. Deas said Dixon was primarily responsible for the "factual witnesses" at trial, while he focused on preparing for the "entire mitigation phase." He said that Dixon attended part of the petitioner's Sevier County trial and a seminar on the death penalty to help prepare for the petitioner's Blount County trial. Deas estimated that he and Dixon billed the state $36,000 for their work on the petitioner's case over a four-year period, not including the direct appeal that they also handled. He said he and Dixon were aware of the heightened responsibility and standards associated with capital cases. Deas said he was personally opposed to the death penalty and was "interested in doing a good job" on the petitioner's case. He could not recall whether he discussed the petitioner's Blount County case with the petitioner's counsel on his Sevier County case or obtained any materials or information from them other than the trial transcript. Deas said that the Blount County case was circumstantial and "mysterious" in that neither the petitioner nor Sutton seemed to have any motive for killing the victim, who seemed to be their friend. Deas said that the petitioner and Sutton tried to establish an alibi defense. He did not believe anyone on the defense team investigated the petitioner's claim that he, his wife, Sutton, Sutton's girlfriend, and Sutton's sister-in-law went to eat at a Waffle House after bailing the victim out of jail.

Mr. Deas testified that he handled most of the jury selection while Dixon continued interviewing witnesses. Deas said the defense learned about a jury selection expert, Margie Fargo, at the death penalty seminar and requested approval to retain her services. He said he was convinced

that Fargo's assistance was "absolutely necessary" given his inexperience with capital cases. Deas acknowledged that he filed a sixty-page motion seeking approval to retain Fargo. Deas said the request was approved and he had the benefit of Fargo's expertise during the first attempt at selecting the jury in the petitioner's case. However, the jury pool was not sufficient and jury selection had to begin again. Deas said he was "very disappointed" when the trial court announced that payment for Fargo's continued services would not be approved. Deas recalled that the trial court explained that the defense had "gained enough experience" from using Fargo during the initial jury selection and that the denial of further payment was part of an effort to keep costs down following a memorandum to that effect from the Chief Justice of the Tennessee Supreme Court. Deas said that he, Dixon and Sutton's attorneys filed motions to withdraw in response.

Mr. Deas testified that in preparation for the sentencing phase, he read several books or trial manuals and made an effort to "open up" the petitioner's life and portray him to the jury as a human being. He said he was aware of the need to present a social history but not aware that the defense may have been able to secure expert services to assist him. Deas said that he attempted to obtain the petitioner's school records and other documents from his early years but that the petitioner had not stayed in school long and no records could be found. He also tried to present evidence of every stage of the petitioner's life as he interviewed witnesses and gathered mitigation evidence in an effort to persuade the jury not to have the petitioner executed. He also secured the services of Dr. Peter Young, a psychologist, from the University of North Carolina. Deas described Dr. Young as a clinician who conducted in-depth interviews and administered tests to the petitioner. Deas said that Dr. Young tried to establish a defense to the crime itself, as opposed to a defense to the death penalty. Deas said that the petitioner sustained a work injury in the years before the victims' murders. He said that at trial, he tried to portray the effect that not being able to work had on the petitioner. Deas said he was familiar with the term "residual doubt" at the time of the petitioner's trial and understood it to mean that when a case was based on wholly circumstantial evidence, any remaining doubt could be used to argue against a death sentence despite the conviction. Deas said that the gun that killed the victim was never located and that the identity of the actual shooter was never established, facts that he repeatedly emphasized to the jury. Deas testified that he never considered challenging the death penalty as a violation of international law. Deas said he recalled mention of Bill Cogdill, but did not recall investigating him or fires connected to him.

Mr. Deas testified that he was shown information that a Blount County detective received about a man named Lester Johnson for the first time just before the post-conviction hearing. He said the information linking the victim and Branam to Johnson would have been something that he would have investigated further in an attempt to establish that someone else had reason to kill both victims, had he been aware of it. Deas said that he was not aware of other notes in the possession of Blount County detectives or a letter from Troy Turner, a federal inmate, to the mother of the victims, in which Turner suggested that another inmate he knew had information about the murders. Deas said he would have investigated if he had known of the information at trial. Deas said that the defense used Dr. Larry Wolfe to try to establish that the victim died later than the state theorized in an attempt to refute that the petitioner and Sutton were with the victim when he died. He could not recall why he did not object when the state called Dr. Charles Harlan, a rebuttal witness who was not

on the state's witness list. He said that the defense did not object to the state's failure to preserve some of the evidence from the victim's autopsy because they did not learn the evidence was missing until after the trial.

On cross-examination, Mr. Deas testified that the letter from inmate Turner seemed to suggest that another inmate, Bobby Floyd, also had information about the murders. Deas said that although he could not recall seeing Turner's letter, co-counsel Dixon had traveled to Alabama and interviewed Floyd in prison. Deas said that after the interview, he and Dixon felt Floyd might know something about the murders but was not cooperative, so they elected not to call him to testify. As to being faced unexpectedly with Dr. Harlan's testimony, Deas said that the defense would have liked to get another expert to rebut Dr. Harlan's testimony but that he did not believe they were entitled to do so. Deas said that he worked closely with the petitioner's wife in gathering mitigation proof and interviewed many potential witnesses.

James Ronnie McClure testified that he and the petitioner grew up together and that he had observed the petitioner interacting with the petitioner's father and brothers. He described the petitioner as "a pretty good boy" who never got into trouble as a teenager. McClure said that the petitioner's father made him and all the boys in the family stay home from school to do farm work. He said that in addition to subsistence farming, the petitioner's family grew tobacco. McClure said that he witnessed the petitioner's father, Clyde Dellinger, disciplining the petitioner and his brothers in a "pretty rough" manner, using a razor strap or hickory switch to whip them. He said "everybody" he knew received whippings growing up, but he believed that the petitioner's father disciplined more roughly than most parents. McClure said that he read comic books to the petitioner when the petitioner was about ten or twelve years old because the petitioner could not read. He said he continued his friendship with the petitioner until the petitioner got married. He said he knew the petitioner to be "level-headed" and did not observe this demeanor to change when the petitioner drank alcohol. He stated he had seen the petitioner several times in the years before the petitioner's arrest and did not feel that the petitioner had changed, but he was aware that the petitioner was no longer able to work as a result of an injury. He said that he and the petitioner grew up in a poor community where the petitioner helped his neighbors when he could.

On cross-examination, Mr. McClure said he had never seen the petitioner "flare up" as a result of being angry or drunk. He said he had no personal knowledge of the petitioner killing a dog with a chainsaw. McClure said that he had felony marijuana convictions and was serving a sentence for one of the convictions at the time he testified.

Dr. Neal Haskell, a board certified forensic entomologist, testified that he worked as a forensic entomology consultant and a professor of forensic science and biology. He said that his work focused on studying insects on dead and decomposing organisms for use in court. Dr. Haskell testified that as one of eight forensic entomologists in North America, he had investigated over 500 death cases involving entomological evidence and had testified for both the state and the defense. Dr. Haskell said he obtained any insect evidence collected from a scene and from an autopsy, then

evaluated it to determine the stage of insect growth and development using factors such as temperature to develop a time or place of death.

With regard to the petitioner's case, Dr. Haskell testified that he was provided photographs of the crime scene and of the victim's autopsy. He said evidence of insects "was completely lacking" other than one report that ants were present at the location where the victim's body was found. He said that climate and temperature were critical factors in the growth and development stages of insects. He noted that a family of flies called "blowflies" would not fly at temperatures below a certain threshold, which would explain their absence from some remains. Dr. Haskell said that blowflies were the insects most often used in his studies because they are the first to arrive at a scene with human remains and that most was known about their development and life cycle. He said the particular sub-species of blowfly that would have been relevant during February 1992 at the location where the victim's body was found is a very large fly called the bluebottle. He said that he visited the scene and evaluated the temperature and environment to determine why blowflies were not all over the body given that the minimum threshold temperature for blowflies existed during part of the daylight hours around the time that the victim died. Dr. Haskell said he found nothing to explain a reduction or exclusion of blowflies from the scene.

Dr. Haskell testified that under the state's theory that the victim died on the evening of February 21, and considering the fact that his body was found in the late afternoon hours of February 24 and that temperatures had reached into the 60s on those dates, "[t]here should have been any number of flies on the remains." He said that the lack of any evidence of flies led him to conclude that "the remains could not have been there that long." Dr. Haskell said it was possible that others may have missed seeing any blowfly eggs, but he noted that these eggs were fairly large and observable. He said reported rain on February 23 would not have caused any existing eggs to wash away absent a torrential downpour, which was not shown in the weather data. Dr. Haskell said that assuming reported temperatures and the state's theory that the victim was killed on the evening of February 21, he would have expected to see considerable blowfly activity on the victim's body beginning after sunrise on the morning of February 22. He noted that blowflies have a great sense of smell and can be attracted to remains from a mile and a half away, even when humans are unable to detect any odor. Dr. Haskell concluded with a reasonable degree of scientific certainty that the victim died sometime within the hours of darkness on the night of February 22/morning of February 23 and after sunrise on February 24. On questioning by the court, Dr. Haskell said that by a conservative estimate, there would have been obvious blowfly activity on the victim's body in less than twenty-four hours after he died, up to forty-eight hours at the longest.

On cross-examination, Dr. Haskell said that blowflies appear on the scene of a body or animal carcass within seconds if the temperatures are high enough. He said that in the victim's case, another factor attracting blowflies would have been the water in the river near the location of the remains. He said his opinion regarding the victim's time of death was based upon the best available data on temperatures provided to him. He said after fly activity, he would not have been surprised to find some beetle activity based on the reported temperatures. Dr. Haskell said that his estimate of the latest possible time of death as after sunrise on February 24 took into account possible delays

in the blowflies discovering the body at the given temperatures and environment. Dr. Haskell said that nothing in any of the reports or evidence he reviewed expressly stated that no blowfly activity was seen, but he interpreted the lack of reference to evidence of blowflies as indicating none were present.

Lynda Dellinger testified that she and the petitioner were married in October 1981. She said she recalled the night in February 1992 when the victim's trailer had burned as follows: She and the petitioner were at home, and Sutton and his girlfriend were visiting. At some point, the petitioner and Sutton left to bail the victim out of jail, and they returned around midnight. After witnessing the victim's trailer burning, the two couples went to the Huddle House in Pigeon Forge to eat at about 2:00 a.m. and then returned home. Ms. Dellinger said that the next morning, she saw Branam, who lived just across the road, and also spoke with her on the telephone. Ms. Dellinger said that Branam told her that she was going to file a missing person report regarding the victim. Ms. Dellinger said that the petitioner had just left home to go to Sutton's house and that she was on her way to pick up a pizza to share with the petitioner, Sutton, and his girlfriend. On returning home with the pizza, Ms. Dellinger said that Branam stopped her outside Branam's house and informed her that she was going to check a few places where the victim might be found. Ms. Dellinger said that she related her conversation with Branam to the petitioner and Sutton. She said that after lunch, about 1:30 p.m., the two men told her they were going to search for the victim and left. Ms. Dellinger said she never saw Branam return home that day and estimated that the petitioner and Sutton returned a little after dark.

On cross-examination, Ms. Dellinger testified that during the course of the case, she met with the petitioner's trial counsel and related to them the events of February 21 consistent with her testimony in the present case. Ms. Dellinger said that on February 21, the petitioner was home from about 4:00 p.m. until he left to get the victim out of jail. Ms. Dellinger said that when the victim's daughter called her that afternoon to ask if anyone knew the victim's whereabouts, she called the Blount County jail and discovered that the victim was there. Ms. Dellinger stated, on further recollection, that the petitioner was with Sutton and the victim that afternoon up until about 7:00 p.m. and was not at home when she arrived home from work at 4:00 p.m. She said when the petitioner returned home that evening, he told her that he had been drinking and playing pool with Sutton and the victim at some bars in Maryville. She said that the petitioner told her that the victim had left with a girl he met.

Ms. Dellinger testified that at the time of these events, she and the petitioner owned a white truck and Sutton drove a dark colored Camaro. She said the petitioner did not mention having a disagreement or altercation with the victim earlier that day on Alcoa Highway. She said that later the same evening, Branam's daughter, Jennifer, came to their house, said the victim's trailer was on fire, and asked the petitioner to see if the victim was inside. Ms. Dellinger said that the petitioner told the girl, "Jennifer, he's not there, he's not home" and did not go to the victim's trailer. She said she had no knowledge of the petitioner taking an object wrapped in a sheet and moving it from his truck to her Oldsmobile that night or of him taking something from her car and placing it under their trailer the next morning. She said that she was aware that at some point after leaving to look for the

victim, the petitioner and Sutton encountered Branam, who went with them to Howie's Tavern. She said the petitioner returned home that evening and told her that the three drove around but could not find the victim and that Branam returned to her own car and was driving back to Blount County as the petitioner and Sutton returned home. Ms. Dellinger said she was not aware of anyone seeing or talking with Branam between that Saturday and the day her body was discovered. She said the petitioner told her that after he and Sutton bailed out the victim the night before, the victim left with the same girl that he had met earlier that day. She said the petitioner told her that the victim insisted on leaving with the girl even after the petitioner and Sutton informed him that his trailer had caught fire.

Donnie Huskey testified that he was employed as a detective with the Sevier County Sheriff's Department in 1992 and assisted in the investigation of Branam's death. He said he took a statement from a woman named "Carolyn" that reported seeing Branam's car on February 26, 1992, three days after she was thought to have died.

Dr. Stanton Kessler testified as an expert forensic pathologist. Dr. Kessler testified that, in general, a forensic pathologist has specialized training with sudden and unexpected death including homicide, suicides, and other traumatic deaths, while a medical examiner was usually a physician with some basic training in sudden deaths. He said that in Tennessee medical examiners typically went to the scene of a death to investigate and decide whether an autopsy should be performed. He said that coroners are essentially administrative officials with no specialized training who are appointed to investigate deaths. He said that coroners could have autopsies performed by forensic or general pathologists if required to assist them. Dr. Kessler stated that he was enlisted by the petitioner's post-conviction team to review the evidence and use the findings of other experts on the case to reach his own conclusion as to the victim's time of death. Dr. Kessler said that following his investigation, he concluded that the victim had died within a range of twelve to twenty-four hours before his body was found. He said he used such information as physical changes in the body, insect activity, and the appearance of the victim's wound to help him reach this conclusion. He said he was aware that under the state's theory, the victim was killed about midnight on a Friday, some sixty-four hours before his body was discovered on the following Monday afternoon. Dr. Kessler said that in this case, no toxicology or vitreous tests, "hallmarks" in forensic medicine, were performed to establish the time of the victim's death.

He said that lividity refers to the settling of blood into areas of soft tissue that begins to occur almost immediately after a person dies. He said that because the victim was found head and face down on an inclined area, his face should have been swollen and purplish in color because blood would have settled there if he had been there as long as the state theorized. Dr. Kessler said that the photographs showed instead that the victim's face was a "normal, tannish color." He said that the absence of the settling of blood or "fixed lividity" indicated to him that the victim had been dead "plus or minus twelve hours" when his body was found. Dr. Kessler said that the idea of having a dead body without fixed lividity for two or three days "goes against everything we learn in forensic medicine." Dr. Kessler said that notations in the autopsy report showing that undigested food was in the victim's stomach indicated to him that the victim was killed within about two hours of eating

a meal. He said he questioned why there would be undigested food if, under the state's theory, the victim was killed within thirty minutes of being bailed out of jail. He said if the body had been lying there for several days, enzymes would continue to work and any food should have been digested.

Dr. Kessler testified that the victim's autopsy report did not note any bloating or other signs of decomposition, such as skin or hair slippage, insect activity, or marbling of the skin, which he said would have begun to occur at the reported temperatures. Dr. Kessler disagreed with Dr. Harlan's trial testimony that evidence of fixed lividity was not material in this case and his conclusion that the body had been there seventy hours when found. Dr. Kessler noted he was unable to review the slides that Dr. Harlan had reviewed because they could not be located after the trial. He said that based on the lack of notation in the autopsy report that the victim's organs appeared anything other than normal, together with his own review of the photos of the body and the wound, he had to assume there was no evidence of decomposition. Dr. Kessler said that he had reviewed thousands of deaths and was experienced at conducting reviews based on autopsy reports and photographs to determine whether the conclusions of those in the field were supported by the evidence he reviewed.

On cross-examination, Dr. Kessler testified that he would have expected to see blowfly activity if the body had been outside for several days in the reported temperatures in the area. He noted that there are subfamilies within the blowfly family that hatched their eggs at different rates depending on temperatures. Dr. Kessler said that the autopsy photos showed no evidence of lividity and that even with blood loss from a large wound there was always enough blood to produce some lividity. He said that once lividity has fixed, which occurs about twenty-four hours after death, the blood does not shift to other areas because it can no longer drain in another direction. He said that although there was evidence of lividity still shifting on the photographs of the body taken at the morgue, it was difficult to use that evidence to determine how long the victim had been dead because the constant, cooler temperatures there would stop or greatly slow the lividity process. Shown a blown-up portion of photographic Exhibit 53, Dr. Kessler said that it showed a "blackish" fly on the victim's body close to the gunshot wound to his head. Dr. Kessler testified to his opinion that a white colored material also depicted was grains of unburned gunpowder and not fly eggs or larvae. On further examination, Dr. Kessler said the evidence of rigor mortis was significant because it sets in six to twelve hours after death, then leaves and does not return.

Peggy Joyce Cantrell, a clinical psychologist with expertise in the psychology of rural Appalachia, testified that she reviewed the raw data from the petitioner's psychological evaluations and tests and the clinical observations of previous examiners. She said that she also interviewed the petitioner, his wife, and one of his sisters. Dr. Cantrell said that a person's adult functioning was an outgrowth of his or her development and childhood experiences and noted that the petitioner's family, like many families in rural Appalachia, had limited resources. She said that the petitioner's family existed in "pretty extreme rural poverty." She said the three major influences on a person's development were biological, psychological, and social or cultural influences. She said that in a poor, rural setting such as where the petitioner grew up, there was more isolation and a child was much more dependent on his immediate family and local community.

Dr. Cantrell said the petitioner's family structure was a traditional one in which his father was the "boss" and physical punishment was expected. She said that the petitioner's father was "pretty heavy-handed" with discipline. She said that reports showed that the petitioner attended school infrequently, dropped out, and began working at about age eleven or twelve. She said that at about that same age, the petitioner reportedly began drinking alcohol regularly. She said drinking alcohol at this age could arrest a person's development so that he or she developed an immature and poorly developed personality. She said that the petitioner's psychological evaluation showed that he had cognitive, emotional, and interpersonal deficits in his adult functioning. She said that the petitioner's IQ was shown to be "in the borderline to lower end of the low average range of intelligence . . . . " She said he had limited verbal skills and was basically illiterate. She said personality deficits resulted in the petitioner having difficulty forming and sustaining close relationships with others, but also having a strong need to be nurtured.

Dr. Cantrell said that the petitioner had a history of working steadily from a young age until he was injured in about 1990. As to the petitioner's relationship with his wife, Dr. Cantrell said that Lynda was one of the two people the petitioner felt he could trust and that they appeared to have a close, long-term relationship despite instances of domestic disputes including some physical altercations. She said the couple had endured the deaths of two children which brought them closer together but also led the petitioner to drink more. She said the petitioner was able to hold a steady job despite his drinking but had a history of DUIs, public drunkenness, and barroom brawls. She said he saw himself as the "defender of the little guys" and was "kind of hair trigger in terms of fighting." She said there were many reported incidences of the petitioner helping and taking care of others when he was able, including his allowing Sutton to live with him and his wife. She said that in speaking with the petitioner, she found he had very rigid categories of right and wrong but that they did not necessarily match the law. She said the petitioner's inability to work after a job injury appeared to be devastating to him because he had been a good worker and it had been important for him, as a man and a provider, to work. She said a clinical assessment by Dr. Diana McCoy showed that the petitioner was depressed and thought of suicide after he became disabled. Dr. Cantrell said that the history of the petitioner's decades of alcohol use was not noted in Dr. McCoy's report. She said she also reviewed the neuropsychological evaluation performed by Dr. Peter Young and his trial testimony. Dr. Cantrell said she did not find Dr. Young's testimony helpful or clear. Dr. Cantrell agreed, though, with Dr. Young's testimony that the petitioner was distrustful of others but felt strong dependency needs at the same time.

On cross-examination, Dr. Cantrell testified that the petitioner may have been whipped more often and harder than others but that whipping was a consistent form of punishment in his community. She said that she found no evidence that the petitioner's father disciplined him when he had done nothing wrong and that the petitioner reported that his father "whooped me hard, but didn't beat me." She agreed that even the limited church attendance by petitioner would be considered a positive influence. Dr. Cantrell said that she generally agreed with Dr. Young's findings that the petitioner could lash out or flare up at times and that he had a history of some violent behavior. She disagreed with Dr. Young that the petitioner had characteristics of being a "violent person." She said that the petitioner would have known it was wrong to shoot someone.

She said that she interpreted the results of the petitioner's Minnesota Multiphasic Personality Inventory test as indicating that the petitioner was not a "psychopathic deviate person"–one who was calculating, hard, and showed no remorse for his actions– but a person who simply made bad choices and had bad judgment that was further impaired by substance abuse. Dr. Cantrell said that Dr. Young did a very thorough evaluation and she generally agreed with his findings.

Eugene Dixon testified that he had practiced law since the mid 1970s and was appointed in 1992 as petitioner's trial counsel. He said that the petitioner's case was his first capital case. He said that from the beginning, he understood that he would be working in concert with counsel for co-defendant Sutton and that he discussed this arrangement with the petitioner. Dixon said it was agreed that he would be primarily responsible for preparation of the petitioner's case at the guilt/innocence phase while co-counsel Deas would handle jury selection and the sentencing phase. Dixon said that he tried to maintain his regular workload and income while representing the petitioner but that it was not always possible. Dixon said that pre-trial plea negotiations were unsuccessful and that the petitioner rejected the state's offer near the end of the trial of a life sentence concurrent with the life sentence he had already received in Sevier County. Dixon said that he attended most of the petitioner's Sevier County trial and was generally aware of what the state's evidence would be in the Blount County case as a result. He said that one defense strategy was to contend that someone other than the petitioner and Sutton had killed the victim and that the defense attempted to develop other suspects.

Reviewing a statement of a telephone conversation between Detective Gurley and a North Carolina agent discussing Lester Johnson, Mr. Dixon testified that he had seen the statement and other documents regarding Johnson for the first time in preparing for the post-conviction hearing. He said that Johnson would have been investigated if he had been provided this information before trial. Dixon said that he was aware of allegations that a man named Bill Cogdill, who was an acquaintance of the petitioner and Sutton, confessed or admitted his involvement in the victim's murder shortly after it happened. Dixon said he located and interviewed Cogdill, but Cogdill denied being involved in the murder or ever having made statements that he was. Dixon said he received a copy of a memorandum concerning Cogdill before the trial, but he did not recall who provided the information to him. Dixon said he did not interview any potential alibi witnesses from the Huddle House where the petitioner reportedly ate with his wife, Sutton, and Sutton's girlfriend, on the night of the murder. He said that although the defense was surprised when the state called Dr. Harlan near the end of the trial, the defense decided against requesting a continuance because they had already presented their expert proof regarding the victim's time of death. Dixon said he was unaware of any authority allowing the defense to stop the trial and have a chance to bring in a surrebuttal witness to follow Dr. Harlan.

Mr. Dixon testified that he attended meetings with Dr. Young, the defense's expert mitigation witness, attended planning meetings, and interviewed witnesses in preparation for the penalty phase of the trial. Dixon said that the petitioner's case was his first capital case appeal. Dixon said there was a conscious agreement not to pursue some claims on appeal in order to focus on the approximately fifty issues that counsel considered to be the strongest.

On cross-examination, Mr. Dixon testified that he had represented other clients in non-capital homicides. He said that he visited Bobby Floyd, an out-of-state prisoner, to ascertain whether he could provide information on a possible drug dealing connection as a motive for someone to kill the victim. He said that following his interview, he concluded that Floyd could not or would not help the defense. Regarding the petitioner's alibi, Dixon said that he and Dixon made a conscious decision not to call the petitioner's wife as an alibi witness because they did not want her to be subject to cross-examination "for a number of reasons."

The tape recorded interview of Earl McClure was played in court. McClure said that he was ten or fifteen years older than the petitioner and had known the petitioner and his family since the petitioner was a child. He said the Dellingers were "good people" who farmed small crops of beans and tobacco to support themselves but were not wealthy. He said the petitioner worked on the farm, using a mule to plow, because he was "just a kid" and did not go far in school. He said he drank alcohol with the petitioner and never knew the petitioner to cause trouble or become mean when he drank. McClure said he also knew the victim and often went to his house. He said the victim was "a real good fellow, till he got his leg cut off." He said that afterward, the victim was not as friendly. He was not aware whether the victim got into fights or was involved with drugs. He said he had seen the petitioner "hanging around" with the victim.

State's Proof

Dr. William Marvin Bass, III, an expert forensic anthropologist, testified to his opinion that the white material shown in photographs near the wound to the victim's head were fly eggs. He said one of the photographs also depicted a fly. Dr. Bass said that it was within his area of knowledge to discuss using the contents of food in a victim's stomach to help establish a time of death. He said that the notation in the victim's autopsy report that there was partially-digested food in his stomach "would mean that death occurred within a few hours after the individual had eaten." He said that following death, all body systems stop, including digestion, and decomposition begins. Dr. Bass said that the lack of bloating on the victim's body indicated that it had not yet reached the second of the four stages of death: "fresh, bloat, decay, and dry." He said that in his opinion, the victim showed evidence of lividity around the nose, in the forehead, and under the eye, which indicated that the victim had been lying face-down. In summary, Dr. Bass testified that nothing regarding the body–the lividity, lack of bloating, existence of fly eggs, or evidence of rigor–contradicted the state's theory that the victim was killed late on February 21 and found on February 24.

On cross-examination, Dr. Bass testified that a body's temperature fluctuates with the temperature of the environment around it and slowly reaches the same temperature as its environment. He said that the note on the victim's autopsy that stomach contents were found was not surprising to him because he believed the cool temperatures prevented decay from occurring to the point that the stomach contents would liquify. Dr. Bass reviewed the reported temperatures varying from a low of 24 degrees in the morning hours of February 22, hours after the victim was last seen alive, to a high of 69 degrees on February 24, the date the victim's body was found. He stated that considering that the body was lying on the wet, cold ground and warmed much more

slowly than the temperature of the surrounding air, he did not believe that the internal body temperature ever reached as high as sixty degrees. He said that the skin and outer surfaces of the body would warm faster than the internal organs.

Dr. Bass testified that he saw some evidence of lividity above the victim's left cheek, below his left eye, and on other areas of the left side of his face. He said that the reference in the autopsy report that "partially digested food" was observed in the victim's stomach indicated to him that decay had reached the stage where it was not possible for the examiner to identify more specifically the type of food observed. Dr. Bass explained that there are two stages to the period after death, and his area of expertise was the "extended postmortem interval," or period of several days or longer following death. In particular, Dr. Bass said that he normally worked with skeletal remains after no soft tissue remained for a forensic pathologist to examine during an autopsy. Looking at photos of the victim's body, Dr. Bass said that he remained of the opinion that a fly was depicted, although he could not identify the particular type of fly. Dr. Bass said that he could not agree that if flies laid eggs on the victim's body on February 22 or 23, they would have hatched by the time the body was found on the 24th. He said that it would not be known when the flies first arrived at the body and noted that flies do not generally fly at night or in temperatures below about 50 degrees, or in the rain, all of which could have delayed the flies' discovery of the body. He said the victim's body had not reached the bloating stage when it was found. He disagreed that pathologists, even forensic pathologists, were better trained or able to determine the approximate time of death in a case like the instant case involving a body in the "fresh state." He said that he wrote a chapter dealing with estimating the length of time since death in a handbook commonly used by pathologists performing autopsies. He also said that he was the first person to perform extensive research on what maggots and various animals did to a body relative to establishing the length of time since death.

The petitioner took the stand and announced his intention to invoke his Fifth Amendment right against self-incrimination in response to all questions asked by the state.

Petitioner's Proof in Rebuttal

Dr. Haskell testified that the fields of forensic entomology and forensic anthropology overlapped in the case of studying skeletal remains after most of the soft tissue on a body had been cleared away by insects. He said there was a distinct difference in the two fields in that the anthropologist would study the bones while the entomologist would study aspects of insect behavior. Dr. Haskell said that he did not comment on the material around the wounds on the victim's body because he concluded that it was not insect evidence and saw no reason to discuss it. He said he also looked for indications of adult insect activity on all the photographs and saw none. He said that upon reviewing the photographs again and reading Dr. Bass's testimony, he stood by his opinion that no eggs or adult flies were depicted in the photographs. Dr. Haskell said he and one of his students had one of the photographs digitally enhanced to the point that he could definitely say that the mark that Dr. Bass believed was a fly was in fact the tip of one leaf crossing another. He said the material around the wound was not uniform in size and was much smaller than any fly eggs he would have expected. Dr. Haskell testified that this subject was not discussed in his earlier testimony because

he "assumed everybody would realize that these are not fly eggs . . . ." He was of the opinion that the material was buckshot buffer, consisting of small particles of Styrofoam included within buckshot. Dr. Haskell testified that after cutting open, examining, and comparing the content of the buffer inside various types of buckshot, he found that they all contained buffer made from the same type of plastic material. He said that he could conclude with a scientific certainty that the material around the victim's wound was buckshot buffer and not fly eggs.

Regarding temperatures, Dr. Haskell said that studies had shown that the surface temperature of a body adjusts to the temperature of the surrounding environment within a few hours as opposed to the internal or core temperature of the body, which can be maintained for up to 48 hours. He said it was the surface temperature, including that around wounds on a body, that were relevant to insect activity. He said mother flies begin searching for a place to lay eggs when temperatures exceed 50 degrees. He said that considering the reported temperatures in the area where the victim's body was found, it would have been about twenty-four to forty-eight hours from the time the victim died until egg-laying activity occurred.

Burden of Proof and Standard of Review

The petitioner's post-conviction petition is governed by the Post-Conviction Procedure Act. See T.C.A. §§ 40-30-101 - 40-30-122. To obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. See T.C.A. § 40-30-103 (2003). The petitioner must establish the factual allegations contained in his petition by clear and convincing evidence. See T.C.A. § 40-30-110(f) (2003). Evidence is clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from the evidence. Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

Findings of fact made by the trial court are conclusive on appeal unless the evidence preponderates against them. State v. Nichols, 90 S.W.3d 576, 586 (Tenn. 2002) (citing State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)); Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993). The burden of establishing that the evidence preponderates against the trial court's findings is on the petitioner. Henley v. State, 960 S.W.2d 572, 579 (Tenn.1997). The credibility of the witnesses and the weight and value to be afforded their testimony are questions to be resolved by the trial court. Bates v. State, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. State v. Honeycutt, 54 S.W.3d 762, 766-67 (Tenn. 2001); Burns, 6 S.W.3d at 461. When reviewing issues of law, or a mixed question of law and fact, this court's review is de novo with no presumption of correctness. Nichols, 90 S.W.3d at 586 (citing Burns, 6 S.W.3d at 461)).

I. PURELY DE NOVO REVIEW

The petitioner urges this court to review the trial court's opinion de novo with no presumption of correctness as to both its factual findings and its application of the law to the facts.

The petitioner acknowledges that a trial court's factual determinations are generally reviewed de novo with a presumption of correctness unless it is shown that the evidence preponderates against those findings. See T.R.A.P. 13(d); Burns, 6 S.W.3d at 461. He contends, though, that the deference normally afforded a trial court's determination of the weight and credibility of witnesses testifying before him should not similarly be afforded to other forms of evidence because this court is in an equally good position as the trial court to weigh such evidence for itself. The petitioner concludes that with regard to his claim that he received ineffective assistance of counsel, the claim in general as well as the determination of whether each prong of the Strickland test has been met should be reviewed on appeal without deference to the trial court's factual findings.

In Fields v. State, 40 S.W.3d 450 (Tenn. 2001), our supreme court addressed the standard of review applicable in post-conviction cases. The court stated that de novo review of a trial court's factual findings is required pursuant to Tennessee Rule of Appellate Procedure 13(d) and that under this standard, "appellate courts are to accord those factual findings a presumption of correctness, which is overcome only when the preponderance of the evidence is contrary to the trial court's findings of fact." Id. at 456. The court observed that the appellate courts could review a trial court's factual findings under a purely de novo standard, as the petitioner suggests, only in very limited circumstances and noted that "[b]ecause none of these special circumstances are typically present in a claim of ineffective assistance of counsel, [the appellate courts] could rarely, if ever, conduct a purely de novo review of a trial court's factual findings in this context." Id. at 457.

In summary, our supreme court has stated the standard of review to be applied to claims of ineffective assistance of counsel as follows:

> [A] trial court's conclusion as to whether a petitioner has been denied the effective assistance of counsel is an issue that presents a mixed question of law and fact on appeal. We also reaffirm that this issue is one that is reviewed under a de novo standard of review, consistent with the standards set forth in the Rules of Appellate Procedure. As such, a trial court's findings of fact underlying a claim of ineffective assistance of counsel are reviewed on appeal under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. See Tenn. R. App. P. 13(d); Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, a trial court's conclusions of law--such as whether counsel's performance was deficient or whether that deficiency was prejudicial--are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions.

Fields, 40 S.W.3d at 458. We are bound to follow the applicable law, and we cannot alter the standard of review provided by the supreme court.

II. ERRONEOUS BURDEN OF PROOF

In its "Findings of Fact and Conclusions of Law" ("order"), the trial court began by addressing the burden of proof applicable to the petitioner's claim of ineffective assistance of counsel. The trial court stated:

> In order to be granted relief on the grounds of ineffective assistance of counsel, the petitioner must establish that the advice given or the services rendered were not within the range of competence demanded of attorneys in criminal cases and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland vs. Washington, 466 U.S. 668, 693 (1984). Stated simply, the petitioner must prove both (1) that counsel's performance was deficient and (2) that the deficiency prejudiced the defense. Goad vs. State, 938 S.W.2d 363, 369 (Tenn. 1996). The burden is on the petitioner to prove both prongs by clear and convincing evidence. Tenn. Code Ann. §40-30-210(f); State vs. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

The petitioner contends that in Burns, the Tennessee Supreme Court replaced the reasonable probability standard of proof applied in Strickland with one that impermissibly requires a petitioner to prove his claim of ineffective assistance of counsel by clear and convincing evidence. He takes particular issue with the court's declaration in Burns that the "burden is on the defendant to prove both [prongs of the Strickland test] by clear and convincing evidence." Burns, 6 S.W.3d at 461. The petitioner concludes that the trial court relied on the more demanding clear and convincing standard stated in Burns to deny his claim and therefore, its decision must be vacated. While arguing that the trial court imposed an unconstitutional burden of proof, the petitioner at the same time contends that the trial court properly articulated and applied the current law in this state. He concludes that the Post-Conviction Procedure Act in imposing on a petitioner "the burden of proving the allegations of fact by clear and convincing evidence," see T.C.A. § 40-30-110(f), and Tennessee Supreme Court Rule 28, section 8(D)(1), requiring a petitioner to "establish the grounds alleged and the entitlement of relief by clear and convincing evidence," are unconstitutional in raising the burden above the "reasonable probability" standard of Strickland.

The state responds that although some imprecision is in the trial court's language, there is no indication that the trial court actually imposed an erroneous burden of proof to the petitioner's ineffective assistance claim. Following our review of the trial court's order, we agree with the state.

Again, post-conviction relief is warranted only when a petitioner establishes that his conviction is void or voidable because of an abridgement of a constitutional right. T.C.A. § 40-30-103. Tennessee's Post-Conviction Procedure Act assigns to a petitioner the "burden of proving the allegations of fact by clear and convincing evidence." See id. § 40-30-110(f). In turn,

we apply the two-prong test of Strickland to claims of ineffective assistance of counsel. Under this test, a petitioner must show both that counsel's performance was deficient and that the petitioner was prejudiced as a result of the deficiency. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; Goad, 938 S.W.2d at 369.

In Fields v. State, 40 S.W.3d 450 (Tenn. 2001), our supreme court clarified Burns and the standard by which appellate courts review denials of post-conviction relief based on allegations of ineffective assistance of counsel. In doing so, the court observed that on first-tier review, this court in Burns improperly articulated the relevant burden of proof when we stated that the "petitioner must show both deficiency and prejudice by clear and convincing evidence," instead of more accurately stating that the petitioner has "the burden of proving the allegations of fact by clear and convincing evidence." Id. at 458 (emphasis in original); see T.C.A. § 40-30-110(f).

In this case, the post-conviction court similarly referred to a "clear and convincing" standard in discussing the burden of proof applied to claims of ineffective assistance. In our view, however, the trial court was referring to the petitioner's burden of establishing his entitlement to post-conviction relief by presenting clear and convincing evidence of his factual allegations rather than to his burden of proof under Strickland. A reading of the trial court's order supports this conclusion. As the state correctly notes, the trial court does not elsewhere refer to the clear and convincing standard in analyzing the numerous allegations of ineffective assistance of counsel. In addressing each allegation, the trial court found that counsel performed effectively, i.e., that they were not deficient, and that their performance did not prejudice the petitioner. Other than the trial court's incorrect recitation of the burden of proof as imprecisely stated in Burns, there is nothing to suggest that the trial court deviated from the "overall standard" of Strickland, that is, "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," in analyzing this claim. Strickland, 466 U.S. at 686. The petitioner is not entitled to relief on this issue.

III. CLAIM OF ACTUAL INNOCENCE

The petitioner contends that he raises a "serious claim" that he is "actually innocent of the victim's murder for which he has been convicted and sentenced to death." The petitioner relies primarily on expert scientific testimony at the post-conviction hearing regarding the time of the victim's death. He submits that the testimony of Dr. Haskell and Dr. Kessler conclusively established that the victim did not die at midnight on February 21, but one or two days later. The petitioner characterizes this testimony as new evidence of his actual innocence because if the victim died sometime between the late night and early morning hours on February 22 and 23, he would have had no reason to kill the victim's sister at around 8:00 p.m. on February 22 under the state's theory that she had learned that the petitioner and Sutton had killed the victim the night before. The petitioner concludes that his expert proof as to the time of death disproves the state's theory of the case and establishes his claim that he is innocent of the conviction offense. The petitioner asserts that it would be a violation of his due process rights to execute him for a crime that he did not

commit and that the weight of his actual innocence claim, standing alone, entitles him to post-conviction relief.

In the alternative, the petitioner contends that this court must evaluate his claim that he is innocent in conjunction with the Strickland and Brady violations that he alleges "under a standard of proof that is more deferential to him than would be the case without his claim of actual innocence." Stated differently, he submits that this court must review his claims that the state withheld exculpatory evidence and that he received ineffective assistance of counsel together with his claim of actual innocence and consider whether there was "a serious miscarriage of justice" in his case. The state responds that the petitioner's argument is essentially one that challenges the sufficiency of the evidence. The state concludes that this issue has been previously determined on appeal and may not be relitigated here. In his reply brief, the petitioner asserts that the state mischaracterizes his free-standing actual innocence claim as a challenge to the sufficiency of the evidence to avoid addressing his actual argument that new evidence presented at the post-conviction hearing establishes that he is innocent and is therefore constitutionally ineligible for execution.

At the outset, we conclude that it is not helpful to examine the petitioner's actual innocence claim as a challenge to the sufficiency of the evidence. An analysis of a claim of insufficient evidence involves examining the evidence presented at the trial to determine that a minimum level of proof was presented to support the defendant's conviction. Here, the petitioner does not ask the court to review the trial record as it did on his first appeal to determine whether sufficient evidence was presented to sustain his conviction. Instead, he asserts that new evidence presented at the post-conviction hearing shows that he did not commit the murder for which he has been sentenced to death.

The petitioner's claim of actual innocence is grounded in federal habeas corpus law. In Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853 (1993), the United States Supreme Court held that a claim of actual innocence based on newly discovered evidence is not a ground for federal habeas relief absent an independent constitutional violation which occurred in the underlying state criminal proceeding. However, the Court assumed for the sake of argument "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Id. at 417, 113 S. Ct. at 869. While the Court assumed without deciding that a petitioner might obtain federal habeas review of a claim of actual innocence, standing alone, the Court concluded that the proof tendered by the petitioner in that case, affidavits given eight years after the petitioner's trial which included hearsay and certain inconsistencies, failed to meet "the threshold showing for such an assumed right." In light of this failure of proof, the Court did not articulate the standard for reviewing such a freestanding claim of actual innocence, if one exists at all, other than to declare that the "threshold showing for such an assumed right would necessarily be extraordinarily high." Id.

We reject the petitioner's suggestion that the petitioner can bring the type of independent claim of innocence that the Herrera Court rejected in a post-conviction proceeding in this state. A

"freestanding" claim of actual innocence contends that new evidence shows that the verdict of guilt is incorrect without also asserting that the conviction process was constitutionally inadequate. Under our Post-Conviction Procedure Act, relief "shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. In order to establish a colorable claim for relief, a petition must allege facts showing that the conviction resulted from an abridgment of a constitutional right and demonstrate that the ground for relief was not previously determined or waived. See Rickman v. State, 972 S.W.2d 687, 693 (Tenn. Crim. App. 1997).

The petitioner's free-standing claim of innocence does not fall within the confines of the Act. Boiled down, it is an attempt by the petitioner to relitigate the issue of his guilt based on "new" evidence presented at the post-conviction hearing that he contends establishes that he is innocent. Without alleging any constitutional error at trial, the petitioner seeks, according to his brief, to establish that the guilty verdict is wrong by "add[ing] to the landscape of evidence available for review." We are not persuaded that the Post-Conviction Procedure Act provides a proper forum for pursuing a claim of actual innocence that does not allege constitutional error in the conviction process. Moreover, other avenues exist through which a petitioner properly may pursue a claim of innocence based on newly discovered evidence. Tennessee Code Annotated section 40-30-117 provides for a motion to reopen a petitioner's first post-conviction petition based on a claim of new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted. See T.C.A. § 40-30-117(a)(1). In addition, although the writ of error coram nobis is an exceedingly narrow remedy applicable to very few cases, it is one available for "matters that were not or could not have been litigated on the trial of the case" and for "newly discovered evidence" provided "the defendant was without fault in failing to present certain evidence at the proper time." T.C.A. § 40-26-105; Workman v. State, 111 S.W.3d 10, 19 (Tenn. 2002). Also, clemency is available. In any event, we conclude that the petitioner's claim of actual innocence, standing alone, does not present a cognizable claim for relief in the post-conviction context.

We turn to the petitioner's actual innocence claim presented in conjunction with his claims of constitutional errors at his trial pursuant to Strickland and Brady. Federal habeas law permits a petitioner's otherwise barred federal constitutional claims to be considered on their merits if a proper showing of actual innocence is made. Herrera, 506 U.S. at 404, 113 S. Ct. at 862. As Herrera explains, "[t]his rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." Id. (citing McCleskey v. Zant, 499 U.S. 467, 502, 111 S. Ct. 1454, 1474 (1991)). Further, "this body of our habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Id.

As opposed to a free-standing claim of actual innocence, there are two types of "gateway" claims of actual innocence with distinct standards of review that may be raised to access procedurally barred constitutional claims in the federal habeas courts. A petitioner who claims that he is

"innocent" of the death penalty, that is, that he is not death eligible, "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Sawyer v. Whitley, 505 U.S. 333, 336, 112 S. Ct. 2514, 1217 (1992). On the other hand, a petitioner who claims that he is actually innocent of the offense for which he has been convicted and sentenced to death must show "that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Shlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995) (quoting Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649-50 (1986)).

In the present case, the petitioner brings an actual innocence claim under Shlup. He thereby asserts that his claimed constitutional violations under Strickland and Brady merit greater respect because they are accompanied by a "substantial actual innocence claim." He urges that a more deferential standard of review than that applied to claims of constitutional error unaccompanied by a claim of innocence should be employed in order that the court should determine whether the Strickland and Brady violations he alleges "probably resulted in the conviction of one who is actually innocent." Id.

We are not convinced that his efforts to bolster his constitutional claims with his claim that he is actually innocent avails the petitioner anything in this case. In Herrera, the Court observed that the "fundamental miscarriage of justice exception is available 'only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.'" Herrera, 506 U.S. at 404 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 454, 106 S. Ct. 2616, 2627 (1986) (plurality opinion) (emphasis added in Herrera). Again, the purpose of establishing a Schlup-type actual innocence claim is to avoid procedural default and obtain review of the merits of a petitioner's constitutional claims. In this manner, a petitioner who successfully brings such a "gateway" claim of actual innocence does not obtain relief from his conviction but obtains review of a constitutional claim that would otherwise be foreclosed. Under our Post-Conviction Procedure Act, the petitioner is generally entitled to review on the merits of all colorable claims of constitutional error that have not been waived or previously determined. See T.C.A. § 40-30-104(e). As discussed below, we have reviewed separately the petitioner's claims that counsel provided ineffective assistance, particularly with respect to presenting evidence on the issue of the victim's time of death, as well as his claim that the state withheld exculpatory evidence at the trial. After considering the trial record and the evidence presented in support of these claims at the post-conviction hearing, we have determined that the petitioner has failed to establish constitutional errors during the conviction process that would entitle him to post-conviction relief.

In summary, we disagree with the petitioner that the proof presented at the post-conviction hearing establishes that he is actually innocent of the conviction offense, that he may bring a "freestanding" claim of actual innocence under the post-conviction act without alleging any constitutional error in the conviction process, or that his constitutional claims, bolstered by his claim of innocence, lead to the conclusion that a "serious miscarriage of justice" has occurred that entitles him to relief from his conviction and sentence of death.

IV. BRADY CLAIM

The petitioner asserts that the state withheld from his trial counsel exculpatory information that pointed to "a number of other suspects" in the killings of both the victim and Branam. The petitioner concludes that defense counsel could have used the undisclosed information to establish the existence of reasonable doubt of the petitioner's guilt by presenting the jury with other persons who had reason to kill both victims.

First, the petitioner asserts that the state failed to provide to defense counsel a summary of a telephone conversation between Blount County Detective Dale Gourley and Agent Sam Gregory of the North Carolina State Bureau of Investigation regarding a potential suspect named Lester Johnson. As summarized by Detective Gourley, Agent Gregory related that Johnson was tried in 1992 in North Carolina for an assault against Tina Hartman, a resident of Sevier County. According to Agent Gregory, Hartman was acquainted with Tommy Griffin and Connie Branam and wanted them to testify at Johnson's trial as "character witnesses" on her behalf. The summary further reported that "Johnson was supposedly a close associate of James Dellinger and Gary Sutton of Sevier Co." Detective Gourley wrote that Agent Gregory further advised that the victim did not appear at Johnson's trial and that Johnson was acquitted of the charges against him on February 21, 1992, the same day the victim disappeared. After reciting the events that ultimately lead to Johnson's being tried for the assault on Hartman, Detective Gourley concluded the memorandum by suggesting that "[i]f the two murders related to the afore listed incidents then these murders may have been contract/revenge killings in retaliation for the arrest of the Lester Johnson."

The petitioner contends that the state also withheld information favorable to him regarding another possible suspect. The petitioner refers to a two-line note taken from the file of the state's lead investigator that states that "Bill Cogdill came to Tom's trailor [sic] the night before it burned: They had an argument (Tommy)." Finally, the petitioner asserts that the state also withheld "records connecting Bill Cogdill to other fires" in the form of an investigation report from the state fire marshal's office which concluded that the burning of Cogdill's trailer on February 29, 1992, was arson.

At the evidentiary hearing, both trial counsel testified that the state did not provide them with the information it had regarding Lester Johnson. Counsel testified that if the defense had received any such information, they would have investigated Johnson as a potential suspect. Lead counsel Dixon acknowledged, though, that at some point before the petitioner's trial, he had seen the investigator's note indicating that Cogdill and the victim had argued just before the victim disappeared. Although he could not recall who provided the note, Dixon said that he was made aware of the information and particularly recalled meeting with Sutton's counsel and discussing "the alleged burning of [Cogdill's] house as mentioned in the memo . . . ." Dixon said that he located and interviewed Cogdill but that Cogdill denied any involvement in the murders or ever having made statements claiming that he was responsible.

In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct.1194, 1196-97 (1963), the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See also State v. Marshall, 845 S.W.2d 228, 232 (Tenn. Crim. App. 1992). Before an accused is entitled to relief under this theory, he must establish: (a) the prosecution must have suppressed the evidence; (b) the evidence suppressed must have been favorable to the accused; and (c) the evidence must have been material. See United States v. Bagley, 473 U.S. 667, 674-75, 105 S. Ct. 3375, 3379-80 (1985); Brady, 373 U.S. at 87, 83 S. Ct. at 1196-97; State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995).

Regarding the Cogdill note, we conclude that the petitioner has failed to establish at the outset that the prosecution suppressed this evidence. Trial counsel Dixon said that he had seen the note regarding Cogdill before the petitioner's trial and had discussed its contents more than once during pre-trial meetings with Sutton's counsel. The record supports the trial court's finding that trial counsel were provided this information regarding Cogdill and that no discovery violation occurred in this instance.

Regarding the state's memorandum summarizing information it received regarding Lester Johnson, after briefly disputing that the state suppressed the memorandum, the state essentially responds that "no proof was presented to the post-conviction court that the State acted in bad faith or intentionally withheld any exculpatory evidence from the defense." The state seemingly concedes that the information on Johnson may not have been disclosed, but it takes the position that it was not exculpatory or material. Evidence is considered material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Edgin, 902 S.W.2d at 390 (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565 (1995)). The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Whitley, 514 U.S. at 434, 115 S. Ct. at 1555.

The petitioner argues that the Johnson memorandum was material, exculpatory evidence that implicated Johnson as a possible suspect in the victim's murder and would have likely led the jury to acquit the petitioner. When considered in this light, the memorandum contained information somewhat favorable to the petitioner. At the same time, the memorandum also reported that the victim did not testify at Johnson's trial and that Johnson was acquitted on the same day that the victim disappeared. In order for the jury to have considered Johnson, rather than the petitioner, as the likely killer, it would have been necessary for jurors to believe that immediately after being acquitted at his trial in North Carolina, Johnson traveled to Sevier County, located the victim, and killed him shortly after the petitioner and Dellinger bailed the victim out of jail, all in retaliation for Johnson's initial arrest for an assault on Hartman. Although not advanced by the petitioner, it occurs to the court that Detective Gourley's suggestion of a "contract/revenge killing" in the memorandum could also be interpreted as an indication that Johnson had someone, but not the petitioner, kill the victim on Johnson's behalf. In considering this same evidence, the trial court found that "[r]ather than exculpating the petitioner, this evidence supplies the missing motive to kill Griffin and Branam

who were going to testify against the petitioner's friend, Lester Johnson." The trial court concluded that no Brady violation occurred because the Johnson memorandum was not exculpatory in nature. In our view, to the limited extent that the memorandum may be read to contain information favorable to the petitioner, we conclude the petitioner has not shown that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435, 115 S. Ct. at 1566. The petitioner is not entitled to relief on this issue.

Finally, the petitioner asserts that in the course of their investigation of the instant post-conviction case, counsel unearthed information suggesting potential connections between the victim and a number of drug dealers in the Sevier County area. The petitioner asserts that post-conviction counsel were unable to follow these leads to establish whether any of these men actually killed the victim because the trial court denied a continuance of the hearing for this purpose. Notably, the petitioner does not contend that the state had in its possession any information relative to this claim. Therefore, it does not support the petitioner's Brady claim.

V. INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Inherent in the right to counsel is the right to the effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S. Ct. 1708, 1716 (1980).

In Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984), the United States Supreme Court stated that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." In addressing claims of ineffective assistance of counsel, the Tennessee Supreme Court has stated:

> To prevail on a claim of ineffective counsel in this proceeding, the appellant must prove by a preponderance of the evidence that the advice given or services rendered by his counsel fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). He must also demonstrate prejudice by showing a reasonable probability that but for counsels' error, the result of the trial proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Goad v. State, 938 S.W.2d 363, 369 (Tenn.1996).

King v. State, 989 S.W.2d 319, 330 (Tenn. 1999).

Our supreme court has emphasized that the failure of a petitioner to sustain his burden of proof under either prong of the Strickland test will result in the denial of relief:

> Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad, 938 S.W.2d at 370.

A. Failure to Investigate and Challenge Time of Victim's Death

The petitioner contends that trial counsel failed to appreciate that the state's case hinged entirely on establishing that the victim died close to midnight on Friday, February 21 when they did not independently investigate and challenge the state's theory as to the time of the victim's death. The petitioner points to the fact that trial counsel relied on Dr. Larry Wolfe, who the petitioner claims was an "unqualified doctor" procured by co-defendant Sutton's counsel, in an effort to prove that the victim died several days later, closer to the time that his body was found on February 24.

At the post-conviction hearing, co-counsel Deas said that the time of the victim's death was of "obvious importance" to the defense because the possibility of enlarging the time frame between the time that the victim was last seen with the petitioner and Sutton and the time he died would make it more probable that the victim was not with the two men when he died. Deas said that the defense anticipated the critical nature of this issue when they decided to call Dr. Wolfe as one of their last witnesses. He said, "We knew it was coming, we knew we had it. We were hoping, factually speaking that it would carry the day."

On appeal, this court observed that "much of the defense proof went to establishing that the petitioner and Sutton were friends with Griffin and had no reason to kill him, that Griffin died long after he was last seen with [Dellinger and Sutton], and that there were several other possible culprits in this case." Dellinger, 79 S.W.3d at 496-97. Through Dr. Wolfe, a medical doctor and coroner, the defense offered proof contradicting the state's theory of the victim's time of death. Dr. Wolfe challenged the state's theory of the case when he testified that the victim had been dead between twenty-four and thirty-six hours when his body was found on the afternoon of February 24. See id. at 488. We believe the record does not support the petitioner's contention that trial counsel failed to investigate and present proof regarding the victim's time of death at trial. The failure to establish that counsel were deficient in this regard means that the "performance prong" of Strickland's test is not met and the claim of ineffective assistance fails.

At the post-convicting hearing, the state contradicted the petitioner's theory that the victim died much later than the state had argued at trial. Dr. Kessler and Dr. Haskell both ultimately

concluded that the victim died sometime between the late night hours of February 22 and the morning hours of February 24. Dr. Bass testified in rebuttal, however, that nothing in his review of the evidence regarding the body, including the evidence of lividity, lack of bloating, existence of fly eggs, and evidence of rigor mortis, contradicted the state's theory that the victim was killed late on February 21 and found three days later.

In its order denying this claim, the trial court found that the trial record and evidence during the post-conviction hearing revealed a "very extensive investigation" at the guilt phase of the trial. The trial court agreed that the petitioner's expert proof cast some doubt on the time of the victim's death, but it found that the state countered this proof with the testimony of Dr. Bass, an expert whose credentials were also impressive. The trial court concluded that none of the proof presented at the post-conviction hearing would have altered the jury's verdict if presented at trial.

At the trial, both parties presented expert opinions on the length of time the victim had been dead when his body was found. Dr. Wolfe estimated that the victim had been dead for twenty-four to thirty-six hours when found. At the post-conviction hearing, the petitioner presented two experts, Dr. Kessler and Dr. Haskell, both of whom also placed the victim's time of death much later than that suggested by the state's proof. Dr. Kessler, for instance, estimated that the victim had been dead between twelve to twenty-four hours when found, while the state's expert, Dr. Bass, affirmed from his review of the evidence the state's theory that the victim died sometime around midnight on the night he disappeared. As the trial court found, the issue of time of death involved a classic case of conflicting expert testimony. It is the jury that determines the weight and credibility of expert testimony. State v. Anderson, 880 S.W.2d 720, 732 (Tenn. Crim. App. 1994). The verdict establishes that in this case, the jury accredited the expert testimony supporting the state's theory of the case.

The record supports the trial court's conclusion that the petitioner failed to show that counsel were deficient in failing to present additional expert proof or a reasonable probability that but for such omission, "the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 696, 104 S. Ct. at 2069. With respect to this allegation of ineffective assistance of counsel, the petitioner has failed to establish either deficient performance or prejudice under Strickland.

B. Failure to Challenge Testimony of State's Rebuttal Witness

The petitioner challenges trial counsels' failure to offer proof through another expert after the defense was unexpectedly confronted with the testimony of Dr. Charles Harlan when the state was permitted to call him as a rebuttal witness to Dr. Wolfe near the end of the petitioner's proof. The petitioner submits that presenting additional expert testimony was a "particularly viable option" because defense counsel had already consulted with a forensic pathologist, Dr. Cleland Blake, and could have prepared him to testify on short notice.

At the post-conviction hearing, Mr. Deas offered no reason why, in addition to objecting to Dr. Harlan, the defense did not request a recess or a continuance and the opportunity to call a

witness. Mr. Dixon testified that during a break, counsel discussed this development but decided not to move for a continuance. Dixon said that the issue of the victim's time of death was "hotly contested" and that the defense had already put on their expert proof through the testimony of Dr. Wolfe, which they considered damaging to the state's case. He acknowledged, though, that the defense was "surprised" when Dr. Harlan was called and said he was not aware of authority that would have allowed the defense to bring in another expert to rebut Dr. Harlan's testimony. Dixon said that the defense had conferred with Dr. Blake, a forensic pathologist, but determined not to call him on the petitioner's behalf because his opinions did not support their defense.

We conclude that the petitioner has failed to demonstrate that counsel provided ineffective assistance as to this claim. Reviewing the "cold" trial record, one might believe that it may have been advisable for defense counsel at the time to have requested some time to decide how they might counter the unexpected testimony of Dr. Harlan. On a claim of ineffective assistance of counsel, however, "the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings." Thompson v. State, 958 S.W.2d 156, 162 (Tenn. Crim. App. 1997); Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); State v. Martin, 627 S.W.2d 139, 142-43 (Tenn. Crim. App. 1981). Defense counsel said that after being presented with Dr. Harlan, they conferred and decided not to seek a continuance. From Mr. Dixon's testimony, we infer the decision was partly the result of his lack of awareness of any measures the defense could have taken to counter Dr. Harlan's testimony. In addition, however, Mr. Dixon said that the defense felt that they had already successfully presented "damaging" proof regarding the time of the victim's death through Dr.Wolfe. Mr. Dixon also indicated that the defense was not in a position to rebut Dr. Harlan's testimony because the additional expert that they had consulted did not support their defense. Under the facts presented, we cannot conclude that the decision not to challenge Dr. Harlan's testimony was unreasonable.

C. Failure to Investigate Petitioner's Alibi Defense

At the trial, Sutton's girlfriend, Carolyn Weaver, testified that on February 21, after leaving to bail the victim from jail, the petitioner and Sutton returned to the petitioner's home around midnight. She said that she and Sutton, together with the petitioner and his wife, left about 2:00 p.m. to eat at a new Huddle House restaurant in Pigeon Forge and returned about an hour later. The petitioner alleges that trial counsel failed to investigate the petitioner's alibi that he could not have been with the victim at the time of the murder by pursuing witnesses from the Huddle House to corroborate his presence there.

Co-counsel Deas testified at the post-conviction hearing that the petitioner's case was "mysterious," in that there seemed to be no motivation for the petitioner to kill the victim considering their history of apparent friendship. He said the defense worked to explain this by pursuing an alibi defense. He said in view of the proof that the petitioner and Sutton bailed the victim out of jail at a known time, the defense concentrated their efforts on establishing what happened to the victim and the petitioner and Sutton after that time. He said the defense tried to

establish that the petitioner and Sutton went to eat at a Waffle House, then returned to the petitioner's home. Deas said that he did not recall whether anyone from either defense team subpoenaed anyone from the restaurant as an independent alibi witness, although he agreed that it would have been "wonderful" to have witnesses in addition to Sutton's wife and sister-in-law who could have corroborated the petitioner's alibi. In addition, Mr. Dixon testified that the defense decided not to call the petitioner's wife at the guilt phase because they did not want her exposed to cross-examination.

At the post-conviction hearing, the petitioner's wife testified that the petitioner and Sutton went to bail the victim out of jail and returned to the petitioner's home around midnight. She said that the two couples watched the fire at the victim's trailer for a while, then left to go eat at the Huddle House at about 2 a.m. The petitioner presented no "independent" alibi witnesses who could attest to the petitioner's presence at the restaurant that morning. In our view, however, any such witnesses would not have firmly established the petitioner's alibi because the jury could have reasonably believed, consistent with the state's theory, that the petitioner and Sutton bailed the victim out of jail, killed him soon afterwards, then returned home and went out to eat some two hours later.

The trial court did not specifically address this issue in denying relief. After our review of the record, though, we conclude that the petitioner has failed to establish prejudice as to this allegation. When a petitioner fails to show that an error by counsel "actually had an adverse affect on the defense," he is not entitled to relief. Strickland, 466 U.S. at 693, 104 S. Ct. at 2067.

D. Ineffective Assistance During Voir Dire and Sentencing

The petitioner contends that trial counsel rendered ineffective assistance during voir dire by failing to prepare independently for this stage of the trial and by relying too heavily on their former jury selection expert. The petitioner concludes that their deficiencies led counsel to conduct an inadequate voir dire. The petitioner further contends that trial counsel failed to explain sufficiently the concept or purpose of mitigation evidence.

Addressing the prejudice prong of the Strickland test first, we conclude that the petitioner has failed to establish any prejudice resulting from counsel's alleged deficiencies in conducting voir dire. The petitioner generally alleges that counsel failed to question prospective jurors sufficiently to expose any biases or pre-trial exposure to the case that might prejudice him, or to challenge for cause those jurors that they could identify as having an actual bias against him. However, the petitioner fails to point to any evidence that suggests that a biased juror or jurors were seated on the jury as a result of the asserted acts or omissions by his attorneys. Moreover, the petitioner presented no proof as to this issue at the post-conviction hearing. With only the bare allegations of ineffective assistance that he makes, the petitioner cannot establish that but for counsels' unprofessional errors, the results of the proceeding would have been different. Strickland, 466 U.S. at 689-90, 104 S. Ct. at 2064-65.

Next, the petitioner contends that trial counsel never properly explained or defined the concept of "mitigation evidence" to the jury. He asserts that counsel failed to explain that the proper inquiry was the degree of the petitioner's moral culpability and not his responsibility for the crime.

The state responds that it cannot specifically address the petitioner's allegations of error because the trial record has not been made a part of the post-conviction record on appeal. The state also contends the petitioner failed to develop this claim at the post-conviction hearing. For these reasons, the state asserts that this claim lacks merit. The court appreciates the state's position that meaningful response to the petitioner's specific allegations of ineffective assistance of counsel at trial and on appeal is not possible absent review of the underlying trial record that has not been included in the appellate record of this post-conviction appeal. It is well-settled, however, that this court may take judicial notice of the record in the first appeal of a case. See T.R.A.P. 13(c); Pruitt v. State, 3 Tenn. Crim. App. 256, 460 S.W.2d 385, 395 (1970); State ex rel. Wilkerson v. Bomar, 213 Tenn. 499, 376 S.W.2d 451, 453 (1964). We have reviewed the record of the petitioner's Blount County trial as relevant to the petitioner's allegations.

Again, the petitioner contends that trial counsel incompletely or incorrectly explained the purpose or scope of mitigation evidence to the jury. To prevail on a claim that counsel were ineffective in the penalty phase of a capital trial, the petitioner must show "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695, 104 S. Ct. at 2069. The record reveals that the petitioner presented little proof in support of this allegation at the post-conviction hearing. Mr. Deas generally testified that he was responsible for the sentencing phase of the trial and that his efforts went toward presenting the petitioner's life and trying to show how the petitioner had reached that point in his life. To this end, Mr. Deas said he investigated the petitioner's background and interviewed his family members to gather proof about every stage and facet of the petitioner's life. He said that he was "looking for good things, especially, to say about [the petitioner] so the Jury could get a feeling for him and . . . want to confine him, but not execute him." Mr. Deas said that his ultimate goal in presenting mitigation evidence was to portray the petitioner as a human being with good qualities whose life should be spared despite his conviction. As summarized by our supreme court, the jury was presented at the trial with mitigation evidence about the petitioner as follows:

> Dellinger presented proof that he was raised in a large family with eight children. His parents were loving but were harsh disciplinarians, and his family was very poor. Dellinger left school when he was ten years old and never learned to read or write. He became a carpenter, and testimony showed that he was a good employee until 1990 when he sustained a back injury that forced him to quit working. Dellinger has four children and two stepchildren from his two marriages. Two of his children had died tragically-an eighteen-year-old daughter died in a car accident, and a fifteen-month-old son died when a stove fell on him. Dellinger

> presented evidence that he is a non-violent, religious, helpful, and kind-hearted man. He had been a well-behaved prisoner and had prevented another prisoner from committing suicide. Clinical psychologist Dr. Peter Young testified that Dellinger has an IQ between 72 and 83 and has borderline personality disorder. He related that due to a lack of family nurturing Dellinger is distrustful of others. Young testified that although Dellinger is not violent he is capable of "flaring up" when drunk and angry. Young opined that Dellinger would do well in a structured prison environment.

See Dellinger, 79 S.W.3d at 465.

The jury was instructed to consider some twenty mitigating factors, many of which tended to diminish the petitioner's culpability for the crime, such as his limited education, below-average intelligence, difficult childhood, and impaired judgment at the time of the offense. The trial court properly instructed the jury to consider, in addition to the listed mitigating circumstances, "any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence."

At the sentencing phase, counsel told the jury that he wanted to emphasize what he hoped would be viewed as "positive things" about the petitioner. In summarizing the mitigation evidence, counsel focused on such factors as the petitioner's childhood of poverty and harsh discipline, his limited education, and the tragedies that the petitioner had endured in the accidental deaths of two of his children. Counsel repeatedly told the jury that the mitigation evidence was offered not to exonerate the petitioner for his crime, but as metaphorical "windows" into the petitioner's life that the jurors could weigh in their sentencing decision. Counsel urged the jurors to weigh the evidence and decide whether the petitioner "can be a worthwhile human being now, have some kind of useful life" in the confines of his prison cell, thereby arguing that the evidence warranted a sentence less than death in his case. In our view, such argument essentially served to inform the jury "that the question at hand was not whether . . . Mr. Dellinger was responsible for the acts but rather what was the degree of his moral culpability," as the petitioner frames the relevant inquiry.

In addressing a habeas corpus petitioner's claim that his trial attorney was ineffective during closing argument, the United States Supreme Court observed that "judicial review of a defense attorney's summation is . . . highly deferential." Yarborough v. Gentry, 540 U.S. 1, 6, 124 S. Ct. 1, 4 (2003). The Court stated that although the right to the effective assistance of counsel extends to closing arguments, counsel "has wide latitude in deciding how to best represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." Id., at 5-6, 24 S. Ct. at 4. We believe such deference extends to trial counsel's decision in the present case to highlight at the sentencing those factors that he believed would persuade the jury to preserve the petitioner's life. Moreover, we are unpersuaded that a more particular explanation of the concept of the petitioner's moral

culpability or further emphasis on those mitigating factors that diminished his moral culpability would have affected the jury's sentencing determination.

In summary, the petitioner has failed to show "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695, 104 S. Ct. at 2069. The petitioner's claim of ineffective assistance of counsel during the sentencing phase fails.

E. Ineffective Assistance of Counsel on Appeal

The petitioner asserts that counsel rendered ineffective assistance by failing to present the following issues on direct appeal: 1) the trial court erroneously instructed the jury as to lingering doubt; 2) the prosecutor improperly urged the jury in closing argument to consider non-statutory aggravating circumstances; 3) the jury was not sequestered during voir dire and jurors regularly drove past the location where the victim's body was found en route to the courthouse, thereby prejudicing the petitioner. In addition, the petitioner asserts that counsel failed to raise and preserve various challenges to the constitutionality of the death penalty that he now presents in the instant appeal. The state again contends that the petitioner's failure to include the trial transcript in the record and to present proof in support of these allegations at the post-conviction hearing results in a record that is inadequate to allow for meaningful response to this issue. As previously noted, we take judicial notice of the trial transcript from the original trial.

The Fourteenth Amendment to the United States Constitution guarantees an indigent criminal defendant the right to counsel in his first-tier appeal. Douglas v. California, 372 U.S. 353, 83 S. Ct. 814 (1963). Under due process, the right to counsel on appeal necessarily encompasses the right to the effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387, 397, 105 S. Ct. 830, 837 (1985). "To determine whether appellate counsel was constitutionally effective, we use the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) - the same test that is applied to claims of ineffective assistance of trial counsel asserted under the Sixth Amendment to the United States Constitution." Carpenter v. State, 126 S.W.3d 879, 886 (Tenn. 2004); see also Smith v. Murray, 477 U.S. 527, 535-36, 106 S. Ct. 2661, 2667 (1986) (applying Strickland to a claim of attorney error on appeal).

First, the petitioner asserts that counsel were deficient in failing to assert on appeal that the trial court erred in instructing the jury that "[l]ingering doubt about the guilt of the Defendant is not a circumstance to be considered in mitigation." In this state, residual doubt is a nonstatutory mitigating circumstance. See T.C.A. § 39-13-204(e)(1); State v. Thomas, 158 S.W.3d 361, 403 (Tenn. 2005) (citing State v. McKinney, 74 S.W.3d 291, 307 (Tenn. 2002); State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn.2001)). "Thus, where the issue of residual doubt is raised by the evidence, a jury instruction is appropriate." Thomas, 158 S.W.3d at 403 (citing State v. Odom, 928 S.W.2d 18, 30 (Tenn.1996)). Such evidence "may consist of proof . . . that indicates the defendant did not commit the offense, notwithstanding the jury's verdict following the guilt phase." McKinney, 74 S.W.3d at 307. In Thomas, the defendant testified that he did not commit the charged murder, and

our supreme court determined that based on the defendant's testimony the trial court should have provided the jury an instruction on residual doubt. Thomas, 158 S.W.3d at 403. In the present case, the petitioner did not testify in his own defense at trial, and he fails to note any particular evidence supporting a residual doubt instruction. Further, the only proof on this issue at the post-conviction hearing was a question directed to co-counsel Deas as to his understanding of the term "residual doubt." The petitioner has not shown that he was entitled to a jury instruction on residual doubt. As a result, the petitioner cannot show that he was prejudiced by counsels' failure to argue on appeal that the trial court erred in instructing the jurors that lingering doubt was not a mitigating factor they could consider in sentencing him.

Next, the petitioner contends that counsel rendered ineffective assistance on appeal by failing to argue that the prosecutor in his closing argument at the sentencing phase urged the jury to consider non-statutory aggravating factors. In particular, the petitioner contends that the prosecutor improperly argued that much of the proof presented by the petitioner as mitigating factors was actually unfavorable and that the jury in sentencing the petitioner should consider the effect on the victim's family. The petitioner takes issue with the prosecutor's argument to the effect that although the jury had heard "some good things" about the defendants, "an awful lot of things . . . could just as easily be bad things." We see nothing improper about the prosecutor's comments. The trial court instructed the jury, in relevant part, that "[i]f there is some evidence that a mitigating circumstance exists, then the burden of proof is upon the State to prove beyond a reasonable doubt, that mitigating circumstance does not exist." In asserting that the mitigation evidence was not necessarily favorable and that it "wasn't very believable," the prosecutor was attempting to rebut the evidence relied on by the defendants. This he was entitled to do. See State v. Stephenson, 195 S.W.3d 574, 601 (Tenn. 2006); State v. Bane, 57 S.W.3d 411, 424 (Tenn. 2001) (citing T.C.A. § 39-2-203(c) (1982); Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001)).

The petitioner further challenges the following portion of the prosecutor's closing argument:

> You've seen [the defendants'] families. Their families love them. That would be true with anybody. But when you're doing that balancing and that weighing process I also hope you'll think about the family of Tommy Mayford Griffin, consider whether they loved him or not, as well.

Again, we do not conclude the prosecutor's remarks were improper. Among the mitigating factors that the trial court instructed the jurors to consider was that the petitioner's family members loved and respected him. The prosecutor's brief reference to the victim's family was, in our view, an effort to rebut any argument that petitioner's family was due any particular consideration more than the victim's family. We conclude that the prosecutor did not go beyond the wide latitude afforded him during closing argument in making the challenged remarks.

The petitioner challenges counsels' failure to raise two jury-related issues on appeal. The petitioner makes a general, unsupported argument that counsel were deficient in failing to present

on appeal a claim "that the jury was not sequestered during voir dire." The trial record and testimony at the post-conviction hearing reflect that both general and individual, sequestered voir dire took place. At the post-conviction hearing, Mr. Deas testified that following initial questioning of the panel by the trial court, counsel were permitted individual, sequestered voir dire of potential jurors on the subjects of pre-trial publicity and the death penalty. Deas said that counsel conducted individual voir dire until the trial court determined at a certain point that it would examine the jurors itself in an effort to speed the process but that it would allow counsel to ask questions. The petitioner does not assert any prejudice resulting from this process. The petitioner also generally alleges that trial counsel "failed to present a claim of prejudice by the jury having been housed in Townsend, Tennessee, which required them to regularly pass the location where [the victim's] body was found as they traveled to and from court." At the post-conviction hearing, the petitioner failed to develop any proof regarding this allegation with the exception of asking Mr. Deas whether he knew if jurors had "passed by the location where Mr. Griffin's body was found?" To this single question on the subject, Mr. Deas responded that he believed that that was something that had happened and that it was "addressed in some fashion." The petitioner points to nothing to substantiate this claim and fails to allege how he was prejudiced if the conduct did occur.

We conclude that the petitioner has failed to establish his claim of ineffective assistance of counsel on appeal. He is not entitled to relief on this issue.

F. Cumulative Effect of Errors by Counsel

The petitioner contends that the trial court failed to consider "the circumstances of this case as a whole" in determining whether he established that counsels' performance was deficient. The petitioner concludes that he has satisfied his burden under Strickland of demonstrating that but for counsel's errors, the outcome of his trial would have been different. He refers in particular to counsel's alleged failure to investigate and present proof regarding such critical aspects of the case as the time of the victim's death and the petitioner's alibi.

We have separately addressed each of the alleged deficiencies in counsel's performance and concluded that the petitioner failed to establish his claim that counsel rendered ineffective assistance at trial. A consideration of the circumstances of the case as a whole does not alter our conclusion that the petitioner's Strickland claim has not been established.

VI. FULL AND FAIR HEARING

The petitioner asserts that the denial of a requested continuance resulted in his inability to complete his investigation into other potential suspects, thereby denying his right to a full and fair hearing in violation of due process. Similarly, he argues that the trial court erred in permitting Dr. Bass to testify on a subject that the petitioner contends was beyond his area of expertise.

A. Continuance

In the present case, the record reflects that the petitioner filed his post-conviction petition on March 3, 2003, and counsel were appointed the next day. Following two extensions, counsel filed an amended petition on behalf of the petitioner on August 11, 2003. An evidentiary hearing on the petition was initially set for July 13, 2004. Counsel moved for a continuance on May 25, 2004, citing a need for more time for defense experts to complete their work and more time to obtain a transcript of the petitioner's Sevier County post-conviction hearing. Although the record contains no orders, the record reflects discussion between counsel and the trial court indicating that a continuance was granted and the hearing reset for July 13, 2004, then again continued until September 7, 2004. Because of conflict on the court's docket, the court continued the hearing until October 26. On October 12, 2004, counsel moved for a "reasonable continuance" of the October 26 hearing. In support of the motion, counsel cited a need to investigate "multiple leads calling into question Mr. Dellinger's guilt" and a need to obtain a transcript of co-defendant Sutton's post-conviction hearing conducted in May 2004.

At the October 14 hearing on the motion, counsel informed the court that they had discovered "extensive information," mainly through an interview with Tina Hartman Payne, reportedly an acquaintance of both victims, indicating that the deaths of the victim and his sister were connected to drug activity in the area. Counsel stated that it had identified alternate suspects including Lester Johnson and Dennis "Hippy" Shuler. Counsel said that Bill Cogdill was considered a third suspect after it was discovered that he had "a penchant for starting fires . . . ." Noting its position that the question of the petitioner's motive to kill the victim had never been answered by anyone, counsel strenuously urged the court to allow the petitioner more time to investigate the other suspects and pursue alibi witnesses. Following argument, the trial court declined to continue the hearing. The court stated its opinion that "good lawyers will continue to find things that might bear on a case as long as there's time to look," and that a continuance might be warranted if the defense had evidence, for example, that someone had threatened the victim and the person could not be located. The trial court observed:

> But for me to continue the case after it's been pending so long as it has, there's going to have to be a more concrete, specific problem that can only be remedied by a continuance, and it's going to have to be a problem that's . . . going to bear on the outcome of the Petition, which requires - it's going to have to have some bearing on the - that the trial would be different if it weren't for that - or if that was available, the outcome likely would be different.

A hearing on the petitioner's renewed motion for continuance was held on the scheduled hearing date, October 26. The petitioner's case investigator, Tammy Kennedy, summarized her investigation of the petitioner's case. She stated she had also investigated the petitioner's Sevier County case and that her work overlapped the instant case. She estimated she had collected about twenty-five boxes of records and made over fifteen trips to Sevier and Blount counties in following

new leads. She said that it took her one year to locate one suspect who was ultimately interviewed in New Mexico in September 2004 and who provided her with other sources of information that she had not yet been able to follow to their conclusion. She said that some evidence, including beer cans and fingerprints at the scene where the victim's body was found, as well as some tissue slides, were missing and could not be further investigated by the petitioner's experts. She said that she had found a new possible suspect, "Greg Adawalt," but she did not have a correct spelling of his name and had not yet located him.

On cross-examination, Ms. Kennedy said that during her investigations, she had not uncovered any witnesses who could place the victim in the company of anyone from the time he was released from jail to the time his body was discovered. Regarding the list of eleven drug-related suspects discussed at the October 14 hearing, Kennedy acknowledged that the state had responded that it would not be possible to obtain any related federal files before the scheduled hearing but that it had informed the petitioner's counsel that a detective from Sevier County had indicated he would be available to share any information the state might have on these potential suspects. Kennedy stated that she had not had time to review any of the state's files. Private investigator Kenny Myers testified that he had been retained and approved to assist the petitioner's team in the week before the hearing. He said that he and his investigators had begun working but had yet to serve subpoenas and interview about eight to ten witnesses. He said that just that morning he was informed that some twenty-five people were connected to potential suspect Lester Johnson and had not yet been investigated.

The trial court ruled that the additional testimony, in addition to that heard on October 14, was "not sufficiently specific" to warrant a continuance. The court reiterated, however, that if the petitioner's team uncovered "some specific evidence that points to another person or persons that might yield beneficial proof" favorable to the petitioner, the court would not hesitate to suspend the hearing to allow the information to be finally investigated.

The decision whether to grant a continuance rests within the discretion of the trial court. See State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991). The denial of a continuance will not lead to a reversal absent an abuse of discretion and resulting prejudice. See State v. Seals, 735 S.W.2d 849, 853 (Tenn. Crim. App. 1987).

Following our review of the record, we cannot conclude that the trial court abused its discretion in refusing to continue the October 26 hearing date. The initial hearing was set for July 13, 2004, eleven months after counsel filed the amended petition. The petitioner was granted at least one requested continuance of the hearing, from July to September 2004, and then had the benefit of a scheduling conflict which forced the trial court to continue the hearing again until October 26. At the hearing on the renewed motion to continue made that date, the petitioner's investigator, Ms. Kennedy, named one potential "new" suspect whom she wanted to interview, but she noted that she did not have a correct spelling of his name or an idea of his possible whereabouts. At no point during the hearing on the motion to continue or during the post-conviction hearing did the petitioner offer any proof of what testimony or relevant information this person would offer and why or how

he was believed to be tied to the victim's murder. Regarding the other suspects whom the petitioner asserted he needed time to investigate, including Lester Johnson, Bill Cogdill, and eleven persons he contends were involved in drug activity in the area, while their identities were apparently known, the petitioner did not offer any evidence that these persons had information or relevant evidence in the victim's killing. Upon review of the records, we conclude that the trial court did not abuse its discretion in denying a further continuance to allow the petitioner additional time to investigate possible alternate suspects and that the petitioner has not demonstrated prejudice as a result of the denial.

B. Testimony of Dr. Bass

Next, the petitioner challenges the trial court's ruling allowing Dr. Bass to testify over the petitioner's objection regarding the significance of the pathologist's notation in his autopsy report that "partially digested food" was observed in the victim's stomach. The petitioner asserts that in doing so, Dr. Bass was allowed to testify to matters not involved in the field of forensic anthropology, Dr. Bass's area of expertise.

During the post-conviction hearing, the petitioner objected to Dr. Bass testifying regarding what partially digested food in the victim's stomach indicated relative to establishing the time of the victim's death. On examination by post-conviction counsel, Dr. Bass hesitatingly agreed that examining stomach contents of a body in the fresh stages of decay was typically performed by a forensic pathologist and was therefore outside his area of expertise, saying "Well, okay, I'll – I'll agree to that." Dr. Bass qualified his answer, however, by explaining that although he was not a pathologist, his personal experience involved extensive research in the area of the rate of human decay. He said that in 1971, he began conducting his own research to assist medical examiners and law enforcement agencies across the state by studying bodies, including decaying bodies, to establish how long they had been dead. He said that also in 1971, he established the "Body Farm" in Knoxville as a research center for post-graduate studies on decay. He said that the "Body Farm" had been an area to view all phases of decay and to determine the length of time that it takes decay to occur. Dr. Bass testified that his opinions about the relationship of the victim's stomach contents and the time of death were based on his own research and experience with human decay at the Body Farm. The court overruled the objection and permitted Dr. Bass to testify to his opinion that evidence of partially digested food in the victim's stomach indicated that he had died within a few hours of eating.

"Questions concerning the qualifications, admissibility, relevancy, and competency of expert testimony generally are left to the trial court's discretion." Howell v. State, 185 S.W.3d 319, 337 (Tenn. 2006) (citing Brown v. Crown Equip. Corp., 181 S.W.3d 268 (Tenn. 2005)). "This Court will not overturn a trial court's decision to admit or exclude expert testimony absent an abuse of that discretion." Id. "A trial court abuses its discretion by applying an incorrect legal standard or reaching an illogical or unreasonable decision that causes the complaining party to suffer an injustice." Id.

Tennessee Rule of Evidence 702 provides for the admissibility of testimony by experts as follows: "If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tenn. R. Evid. 702. In this case, the trial court found that Dr. Bass was qualified by his extensive experience and research on the subject of human decay to offer an opinion that estimated the length of time that the victim had been dead based on his stomach contents. The record supports the trial court's decision to permit Dr. Bass's testimony based not on his formal education or training, but on his extensive research and experience in this area. The trial court did not abuse its discretion by allowing Dr. Bass to testify.

CHALLENGES TO DEATH PENALTY

The petitioner raises various constitutional challenges to the death penalty in general and as applied in his case and to the capital sentencing scheme and laws of this state. In some cases, the petitioner contends that counsel were ineffective in failing to present these challenges on direct appeal. As set forth below, we conclude that none of the challenges are meritorious. Accordingly, we conclude that the petitioner cannot establish deficient performance or resulting prejudice in support of this claim of ineffective assistance of counsel.

VII. DEATH SENTENCE VIOLATES FUNDAMENTAL RIGHT TO LIFE

The petitioner contends that the death sentence imposed on him unconstitutionally impinges on his fundamental right to life and has not been shown as necessary to promote any compelling state interest. Our supreme court has repeatedly rejected the petitioner's argument. See State v. Mann, 959 S.W.2d 503, 536 (Tenn. 1997) (Appendix); State v. Bush, 942 S.W.2d 489, 523 (Tenn. 1997); Cauthern v. State, 145 S.W.3d 571, 629 (Tenn. Crim. App. 2004) (citing Nichols v. State, 90 S.W.3d 575 (Tenn. 2002)).

VIII. APPRENDI CLAIM

The petitioner argues that the failure to include in the indictment the statutory aggravating circumstances used to support his death sentence violated his right to indictment or presentment and notice of the charges against him and the principles announced in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and its progeny. The petitioner acknowledges Tennessee case law to the contrary but submits that recent rulings of the Tennessee Supreme Court ignore federal and state constitutional law. The state responds that this issue is waived for failure to raise it on direct appeal. See T.C.A. § 40-30-106(g). At the same time, the state contends that the failure to raise the issue at trial does not support a claim that trial counsel were ineffective because it is without merit.

In Apprendi, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490, 120 S. Ct. at 2363. In

State v. Reid, 164 S.W.3d 286, 312 (Tenn. 2005), our supreme court reaffirmed its prior holdings rejecting arguments that aggravating circumstances in a capital murder prosecution must be set forth in the indictment as follows:

> This Court has consistently held that Apprendi does not affect capital sentencing in Tennessee and does not require aggravating circumstances to be pled in an indictment. See State v. Leach, 148 S.W.3d 42, 59 (Tenn. 2004); State v. Berry, 141 S.W.3d 549, 562 (Tenn. 2004); State v. Holton, 126 S.W.3d 845, 863 (Tenn. 2004); State v. Dellinger, 79 S.W.3d at 467. In addition, we have clarified that Ring, as well as the more recent decision in Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), "do not change our analysis . . . regarding whether aggravating circumstances must be pled in the indictment." Berry, 141 S.W.3d at 560; State v. Davis, 141 S.W.3d 600, 616 (Tenn. 2004). As we explained in Berry, "the focus in Apprendi, Ring, and Blakely was on the Sixth Amendment right to trial by jury," and "the Court expressly declined to impose the Fifth Amendment right to presentment or grand jury indictment upon the States." Berry, 141 S.W.3d at 560. Moreover, we emphasized that defendants in capital cases receive written notice of the State's intent to seek the death penalty prior to trial, as well as written notice of the aggravating circumstances, under Rule 12.3 of the Tennessee Rules of Criminal Procedure. Id. at 562.
>
> In short, we have held repeatedly that Tennessee's capital sentencing scheme does not require that aggravating circumstances be included in an indictment.

(Footnote omitted.) The petitioner is not entitled to relief on this issue.

IX. PROSECUTORIAL DISCRETION TO SEEK DEATH SENTENCE

The petitioner argues that the unlimited discretion vested in prosecutors in this state regarding whether or not to seek the death penalty in a given case and whether or not to subject a defendant in a first degree murder case to a capital sentencing hearing violates federal and state guarantees of equal protection of the laws. He relies in part on the Supreme Court's holding in Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525 (2000), requiring that fundamental rights be administered uniformly within a state.

The Tennessee Supreme Court has rejected general challenges to the unlimited discretion to seek the death penalty vested in prosecutors in this state. See State v. Thomas, 158 S.W.3d 361, 407 (Tenn. 2005); State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000) (Appendix). Moreover, this court

recently concluded that Bush v. Gore, a voting rights case relied upon by the petitioner, did not apply in the context of a criminal prosecution. See David Keen v. State, No. W2004-02159-CCA-R3-PD (Tenn. Crim. App. June 5, 2006), app. denied (Tenn. Oct. 30, 2006). The petitioner is not entitled to relief on this issue.

X. LETHAL INJECTION

The petitioner asserts that execution by lethal injection amounts to cruel and unusual punishment in violation of state and federal constitutional protections. He further contends that the failure to raise this issue on direct appeal may constitute ineffective assistance by appellate counsel.

We conclude that the issue avails the petitioner no relief. In Adur' Rahman v. Bredesen, 181 S.W. 3d 292 (Tenn. 2005), cert. denied, 126 S. Ct. 2288 (2006), the Tennessee Supreme Court considered the lethal injection protocol employed in this state amid challenges that the protocol violated the protections against cruel and unusual punishment, denied the petitioner's access to the courts, and violated due process guarantees, among other non-constitutional challenges. Following a detailed examination of the lethal injection protocol employed by the Tennessee Department of Correction, the court rejected all of the petitioner's asserted claims for relief. In considering Tennessee's lethal injection protocol, the court found "overwhelming evidence" that this method of execution "is consistent with contemporary standards of decency" and with "the overwhelming majority of lethal injection protocols used by other states and the federal government." Id. at 306-7. Moreover, in February 2007, Tennessee Governor Phil Bredesen initiated a "comprehensive review of the manner in which the death penalty is administered in the State of Tennessee." See State of Tennessee, Executive Order by the Governor, Number 43 (February 1, 2007). The end result of the review undertaken by the Department of Correction was a manual that updated in detailed, written form the procedures for implementing the death penalty but retained the three-drug lethal injection protocol. See generally Tennessee Department of Correction, Report on Administration of Death Sentences in Tennessee (April 30, 2007).

In May 2007, death-sentenced inmate Philip Workman obtained a temporary stay of his execution from the United States District Court for the Middle District of Tennessee based on his Eighth Amendment challenge against Tennessee's three-drug lethal injection protocol. On appeal, the Sixth Circuit Court of Appeals in an extensive, thirty-one page order reviewed the history of the execution procedure in this state. See Philip Workman v. Governor Phil Bredesen, No. 07-5562 (6th Cir. May 7, 2007) (Order). In vacating the stay, the Sixth Circuit concluded that Workman had shown little likelihood of success on the merits of his challenge against Tennessee's execution method. The court observed:

> The Supreme Court has never invalidated a State's chosen method of execution. No court has invalidated the three-drug protocol used by Tennessee (and 28 other jurisdictions). Several state and federal courts have upheld this same three-drug protocol

> (including the Tennessee Supreme Court in 2005[1]). Our court vacated a similar stay in 2006 with respect to a similar challenge and permitted the state to execute the inmate under the protocol.[2] Notwithstanding the decision of the Tennessee Supreme Court in 2005 and the decision of this court in 2006, the state undertook an effort in 2007 to review and improve the procedure. Workman acknowledges that the new procedure is only slightly different from the old procedure and offers no explanation how Tennessee has done anything more than make the new procedure less prone to implementation errors. Everything, indeed, the State has done in reviewing and revising the procedure shows that it is trying to prevent Workman from suffering *any* pain during his execution, not that it is trying or willing to allow a procedure that imposes unnecessary and wanton pain.

See Philip Workman, at 2 (May 7, 2007 order).

Although its decisions are not binding upon this court, we see no reason to depart from the Sixth Circuit Court's reasoning in its order in Workman to dispose of the petitioner's challenge to the use of lethal injection in the present case. The petitioner is not entitled to relief on this issue.

XI. INTERNATIONAL LAW

The petitioner contends that in seeking the death penalty, the state disregarded his rights under customary international law and treaties by which the United States is bound, thereby violating the Supremacy Clause of the United States Constitution.[3] Our supreme court has rejected identical challenges to the imposition of the death penalty based on international law. See Thomas, 158 S.W.3d at 406 (Appendix); State v. Odom, 137 S.W.3d 572, 597-600 (Tenn. 2003). The petitioner is not entitled to relief on this issue.

XII. TENNESSEE'S DEATH PENALTY SCHEME IS FUNDAMENTALLY UNCONSTITUTIONAL

The petitioner brings multiple challenges to the constitutionality of the capital sentencing scheme and the imposition of the death penalty in this state. Acknowledging that these precise issues

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[1] See Abdur' Rahman, 181 S.W.3d at 307.

[2] See Alley v. Little, 181 F. App'x 509, 513 (6th Cir. May 12, 2006).

[3] "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." See U.S. Const. art. VI, cl. 2.

are presented here for the first time, the petitioner submits that the failure to raise them on direct appeal constitutes ineffective assistance of counsel.

First, the petitioner contends that Tennessee's death penalty scheme fails to narrow meaningfully the class of death eligible defendants, thereby rendering the statutory scheme unconstitutional. The petitioner generally asserts that "several" of the statutory aggravating circumstances set forth in Tennessee Code Annotated section 39-13-204(i) have been applied in an unconstitutionally overbroad manner. He particularly challenges only the (i)(2) prior violent felony aggravating circumstance as applied in his case by pointing to the fact that the prior violent felony conviction relied upon to support his death sentence was the first degree murder of Connie Branam. The petitioner notes that under the state's theory of the present case, Branam's murder did not occur until after the victim's murder, yet the (i)(2) aggravating circumstance has been so broadly applied as to permit imposition of a death sentence upon someone who was not death-eligible at the time of the conviction offense. Our supreme court has observed, however, that "[f]or purposes of this aggravating circumstance, the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the sentencing hearing at which they were introduced." See State v. Nichols, 877 S.W.2d 722, 736 (Tenn. 1994) (citing State v. Caldwell, 671 S.W.2d 459, 464-65 (Tenn. 1984); cf. State v. Teague, 680 S.W.2d 785, 790 (Tenn. 1984) (conviction occurring after first capital sentencing hearing but before sentencing hearing on remand could be used to establish circumstance (i)(2) at resentencing hearing)). Moreover, the petitioner's more general argument that "several" aggravating circumstances set forth in section 39-13-204(i) have been so broadly interpreted that they fail to provide a "meaningful basis" for narrowing the class of death-eligible defendants has been repeatedly rejected by our supreme court. See Vann, 976 S.W.2d at 117-18 (appendix); State v. Keen, 926 S.W.2d 727, 742 (Tenn. 1994); State v. Cauthern, 778 S.W.2d 39, 47 (Tenn. 1989).

Next, the petitioner argues that the death penalty in this state is imposed in an arbitrary and capricious manner, thereby rendering his death sentence unconstitutional. In particular, he argues that the death sentence was imposed capriciously and arbitrarily because (1) unlimited discretion is vested in the prosecutor as to whether to seek the death penalty; (2) the death penalty is imposed in a discriminatory manner based upon race, geography, and gender; (3) he was not allowed individual voir dire of prospective jurors; (4) the death qualification process for jury selection makes the jury more likely to convict; (5) the defendant may not address misconceptions about sentencing; (6) the jury is required to unanimously agree to a life verdict in violation of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), and Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988); (7) the failure to instruct the jury on the meaning and function of mitigating circumstances results in the reasonable likelihood that jurors believe they must unanimously agree as to the existence of mitigating circumstances; (8) the jury is not required to make the ultimate determination that death is the appropriate penalty; (9) the defendant is denied final closing argument in the penalty phase; (10) damaged, depressed, and mentally ill defendants are allowed to waive presentation of mitigation evidence; and (11) mandatory introduction of victim impact evidence and other crime evidence violates separation of powers and the defendant's right to due process and equal protection of the laws. This court has previously noted that our supreme

court has rejected each of these arguments. See William R. Stevens v. State, No. M2005-00096-CCA-R3-PD, slip op. at 47 (Tenn. Crim. App. Dec. 29, 2006), app. denied (Tenn. May 21, 2007) (citing State v. Thomas, 158 S.W.3d 361, 406-08 (Tenn. 2005); Odom, 137 S.W.3d at 601-03; Hines, 919 S.W.2d at 582; Brimmer, 876 S.W.2d at 87; State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994); State v. Smith, 857 S.W.2d 1, 23 (Tenn. 1993); State v. Thompson, 768 S.W.2d 239, 250-52 (Tenn. 1989)).

Lastly, the petitioner contends that the appellate review process in capital cases in this state is constitutionally inadequate. In particular, he contends that there is no meaningful appellate review because (1) the statute does not require the jury to make written findings concerning mitigating circumstances; (2) the informational bases for comparative review of first degree murder convictions is inadequate and incomplete; (3) the court's methodology for conducting comparative review is flawed; and (4) the court allows defendants to waive the presentation of mitigating evidence without requiring an offer of proof as to what mitigation evidence is available. We observe that the petitioner offers no citations to the record or to relevant authority in support of his argument. In considering similar challenges, our supreme court has repeatedly held that the appellate review process is constitutionally adequate. See State v. Hall, 958 S.W.2d 679, 719 (Tenn. 1997); State v. Smith, 893 S.W.2d 908, 927 (Tenn. 1994); State v. Cazes, 875 S.W.2d 253, 270-71 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 77 (Tenn. 1992); State v. Barber, 753 S.W.2d 659, 664 (Tenn. 1988).

In summary, we have determined that all of the challenges to Tennessee's death penalty scheme that the petitioner asserts counsel were duty-bound to raise on direct appeal have been previously rejected by our supreme court. The petitioner has made no showing that he was prejudiced by counsels' failure to raise the additional issues challenging the constitutionality of the death penalty scheme and imposition of the death sentence. In considering a claim that counsel rendered ineffective assistance by the failure to raise certain issues on appeal, our supreme court has stated that "[w]hen an omitted issue is without merit, the petitioner cannot prevail on an ineffective assistance of counsel claim." Carpenter v. State, 126 S.W.3d 879, 888 (Tenn. 2004) (citing United States v. Dixon, 1 F.3d 1080, 1083 (10th Cir. 1993)).

Again, the petitioner has made no showing that he was prejudiced as a result of trial counsel's failure to raise numerous constitutional challenges to Tennessee's death penalty scheme on appeal in addition to those specific challenges that counsel did assert. See Dellinger, 79 S.W.3d at 479-81. The petitioner is not entitled to relief on this issue.

CONCLUSION

Following our review of the record and the applicable law, this court concludes that the petitioner has failed to establish that he is entitled to post-conviction relief. Accordingly, we affirm the judgment of the trial court.

JOSEPH M. TIPTON, PRESIDING JUDGE